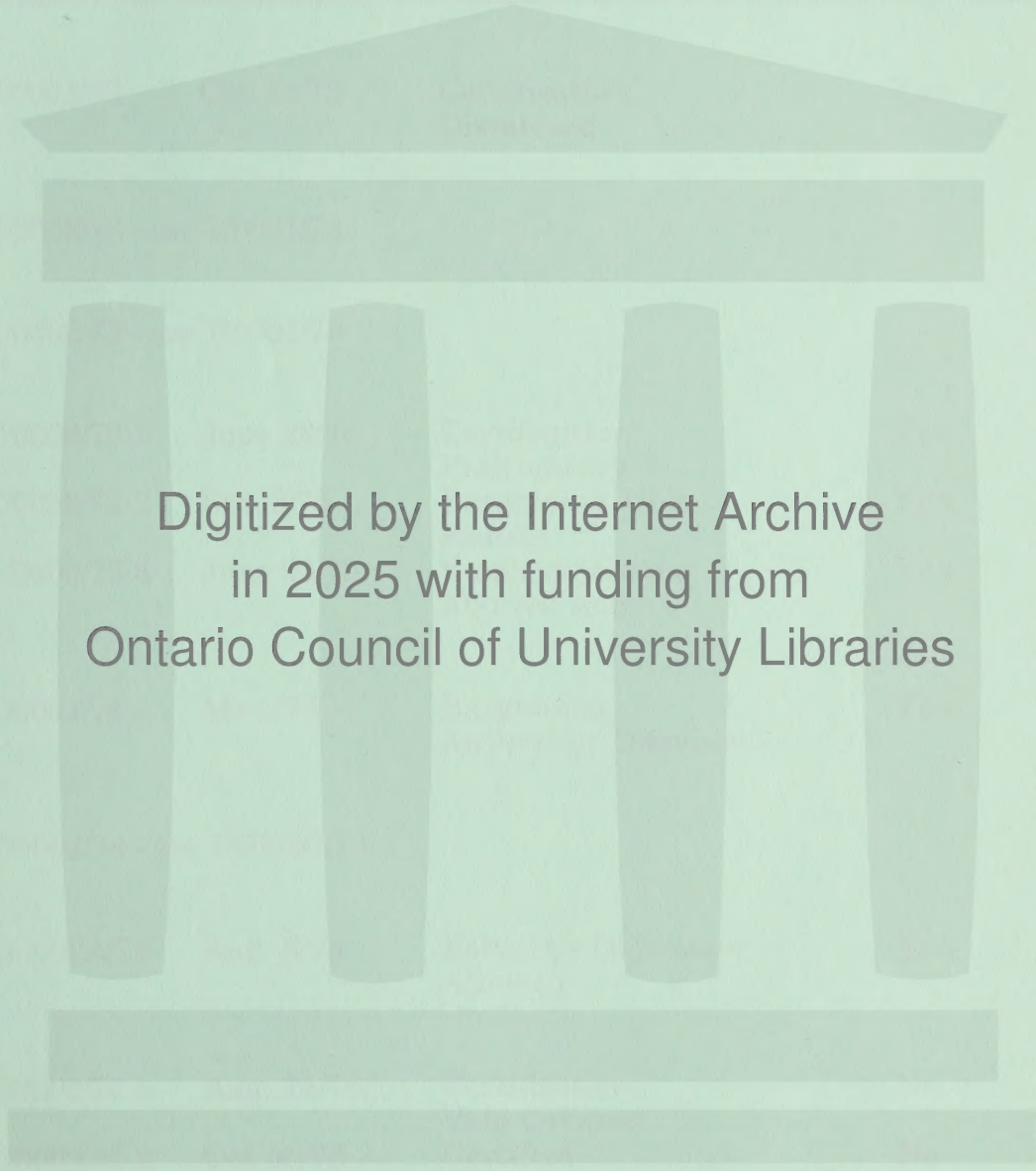
ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

TRIBUNAL DECISIONS

1973 - 1975



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ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

1973 - 1975

File No.	Date	Type and Disposition	Indexed
T/0001/73	Oct. 11/73	Certification; Dismissed	Yes
T/0002/73 - see T/0001/73			
T/0003/73 - see T/0001/73			
T/0009/73-1	June 28/74	Certification; Preliminary	Yes
T/0009/73-2	Feb. 3/75	Bargaining Unit Ruling	Yes
T/0009/73-3	June 20/75	Employee Status; Allowed in part	Yes
T/0001/74	Mar./74	Bargaining Authority; Dismissed	Yes
T/0002/74 - see T/0009/73-1			
T/0002A/74	Aug. 8/74	Religious Objection; Allowed	Yes
T/0003/74-1	Aug. 14/75	Certification; Vote Ordered	No
T/0003/74-2	Oct. 30/75	Certified	No
T/0005/74	Oct. 24/74	Procedural Ruling	Yes

File No.	Date	Type and Disposition	Indexed
T/0011/74	Oct. 27/75	Religious Objection; Allowed	Yes
T/0014/74	Jan. 16/76	Dismissed	No
T/0002/75	Mar. 1/76	Employee Status; Dismissed	Yes
T/0003/75	Nov. 12/76	Religious Objection Reconsideration; Dismissed	No
T/0005/75	Dec. 11/75	Dismissed	No
T/0006/75	July 5/76	Religious Objection; Allowed	Yes
T/0009/75	July 5/76	Religious Objection; Allowed	Yes
T/0010/75	Dec. 11/75	Dismissed	No
T/0012/75	Nov. 29/76	Religious Objection Ruling	Yes
T/0014/75	July 5/76	Religious Objection; Allowed	Yes
T/0015/75	July 8/76	Religious Objection; Allowed	Yes

/3

File No.	Date	Type and Disposition	Indexed
T/0018/75	July 8/76	Religious Objection; Allowed	Yes
T/0019/75	July 5/76	Religious Objection; Allowed	Yes
T/0022/75	July 8/76	Religious Objection; Allowed	Yes

T/1/73, T/2/73
T/3/73

IN THE MATTER OF THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1972

AND

THREE APPLICATIONS BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL 1/73, 2/73, 3/73

BETWEEN:

ONTARIO HOUSING EMPLOYEES' UNION,
LOCAL 767, C.U.P.E., O.F.L., C.L.C.

Applicant

- and -

THE CROWN IN RIGHT OF ONTARIO
(ONTARIO HOUSING CORPORATION -
WINDSOR, OSHAWA AND HAMILTON
HOUSING AUTHORITIES)

Respondent

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES

Intervener

BEFORE: Judge Walter Little, Chairman
Professor D.D. Carter, Adjudicator
Dean R.S. Mackay, Adjudicator

DATES OF HEARING:

July 4, August 15 and 16, 1973.

APPEARANCES: A. Golden, M. Green and others for the applicant.
R.A. Williamson and others for the respondent.
M. Hikl for the intervener.

DECISION

The Applications

The applicant is seeking representation rights in respect of three separate units of employees that it claims to be appropriate for collective bargaining purposes under The Crown Employees Collective Bargaining Act, 1972. The three bargaining units proposed by the applicant are Office Staff, Caretaking, Maintenance, Grounds, Superintendents and Painters of the Hamilton Housing Authority; Office Staff, Caretaking, Maintenance, Grounds, Superintendents and Painters of the Windsor Housing Authority; and Office Staff, Caretaking, Maintenance, Grounds, Superintendents and Painters of the Oshawa Housing Authority. In reply to these applications, the respondent proposes a unit of "all employees in the Province of Ontario of the Ontario Housing Corporation and of all Housing Authorities in the Province of Ontario save and except foremen and supervisors and persons above the rank of foremen and supervisors and persons employed by the said corporation in the Municipality of Metropolitan Toronto". The applications were received on April 19, 1973, and the respondent's replies to these applications were received on June 18, 1973. No notices of intervention were received prior to the terminal date of June 18, 1973.

A hearing of the Tribunal was convened on July 4, 1973, to deal with these applications. At that time, an appearance was made on behalf of the Canadian Union of Public

Employees and a request was made by that organization to be added as a party to the proceedings. The Tribunal, in view of the fact that the Canadian Union of Public Employees had applied to represent certain employees of the Housing Authorities of Sudbury and London, ruled that it should be permitted to make representations on the issue of the appropriateness of the bargaining unit in these three applications. Accordingly, the hearing was adjourned until August 15, 1973, in order to give an opportunity for an intervention to be filed by the Canadian Union of Public Employees, and to give proper notice to all other employee organizations and employees that might be affected by this Tribunal's decision as to the appropriateness of the bargaining unit. This decision of the Tribunal is set out in a ruling of the Chairman, dated July 5, 1973.

The Issue

In dealing with these three applications, the Tribunal must first of all determine the appropriateness of the units of employees being proposed. The powers of this Tribunal to make such a determination are set out in section 3 of The Crown Employees' Collective Bargaining Act, 1972 (the Act). Section 3 reads:

> 3(1) Upon an application for representation rights, the Tribunal shall, subject to subsection (2), determine the unit of employees that is appropriate for collective bargaining purposes under this Act.

(2) The bargaining units designated in the Regulations are appropriate units for collective bargaining purposes under this Act.

By virtue of section 51(d) of the Act, the Lieutenant Governor in Council was given authority to designate upon the day the Act came into force certain units of employees as appropriate bargaining units for collective bargaining purposes under the Act. Among the units established by regulation is a bargaining unit covering "all persons employed in the work of Ontario Housing Corporation within the Municipality of Metropolitan Toronto other than (a) foremen; (b) office staff; (c) persons appointed under the Public Service Act; and (d) persons in a temporary service class who are not members of Local 767 of the Canadian Union of Public Employees by reason of their membership in some other organization". The Regulations further designate the applicant, Local 767 of the Canadian Union of Public Employees, as the employee organization having representation rights in relation to such a bargaining unit upon the day this Act came into force. Thus, the power of this Tribunal to make a determination as to appropriateness is restricted by the fact that certain bargaining units have already been created by regulation.

Despite the limitation mentioned above, the wording of section 3 does give this Tribunal a wide discretion in shaping the structure of public sector collective bargaining in Ontario. It is clear that the legislators have not fettered the independence of this Tribunal by giving it specific instructions as to what constitutes an appropriate unit of employees for

collective bargaining purposes under this Act. The concept of appropriateness of the bargaining unit is one that is to be defined by this Tribunal alone, and to be based on what it considers to be wise industrial relations policy for the public sector.

There are, of course, decisions of other labour relations tribunals, such as the Canada Labour Relations Board and the Ontario Labour Relations Board, concerning the question of what constitutes an appropriate unit of employees for collective bargaining. This Tribunal considers that these decisions merit consideration, but it is also well aware that they arose in the context of private sector collective bargaining. It would be a mistake to think that considerations relevant to the private sector are equally applicable to the public sector. The legislators by creating a separate legal structure for collective bargaining by Crown employees obviously considered that collective bargaining in the public sector of Ontario should not be treated in the same manner as private sector collective bargaining. Thus, in administering the Act, this Tribunal must treat such decisions with caution and only use them when they appear appropriate for the public sector.

Relevant considerations

The factors relevant to determining the unit of employees appropriate for collective bargaining purposes under

the Act can be grouped under three general headings: (a) freedom of association and community of interest; (b) cost of collective bargaining; (c) the public interest.

(a) Freedom of association and community of interest:

Although the Act does not expressly recognize the right of employees to associate freely, this right can be implied from at least one provision in the Act. Section 4 imposes a duty on this Tribunal to grant representation rights to an employee organization where a representation vote has indicated that a majority of employees favour that organization. This provision, containing the concept of majority rule, does indicate that employee preference is one value to be taken into account when administering the Act. On the other hand, it is equally clear that freedom of association is not the only value to be considered by this Tribunal. Even though section 4 contains a notion of employee preference, it does not envisage an absolute and unlimited right of employees to choose their bargaining agent. For once an employee organization has been granted representation rights for a certain unit of employees, employees in that bargaining unit who do not support the employee organization are no longer free to bargain on their own behalf. Thus, even under s. 4 of the Act, employee preference is a limited concept.

Another consideration is the fact that it is this Tribunal, not the employees, which determines the constituency for collective bargaining purposes. This imposes a further restrict-

what unit this Tribunal considers to be appropriate, there may still be employees who would prefer to be part of a different unit. Thus, freedom of association is a qualified concept under this Act and it will be treated as such by this Tribunal.

A further problem arises when applying this qualified concept of freedom of association to the matter of determining the appropriate bargaining unit. The fact is that any determination made on this issue will conflict with the preferences of at least some employees. In order that this inevitable conflict be minimized, it is necessary to identify a community of interest among the employees concerned. The reason for this approach is that, if there was no restriction on the freedom of employees to choose their bargaining constituencies, then a bargaining unit based on common employee interests and goals is the one most likely to be acceptable to the largest number of employees.

A number of factors are relevant in determining what constitutes a community of interest among a group of employees: (1) the performance of similar work utilizing similar skills; (2) the application of similar, or substantially similar, conditions of employment; (3) common direction and control by the employer; (4) geographical proximity of employees to each other; and (5) existing patterns of collective bargaining in the public sector. These factors point to a likely community of interest among employees, but community of interest does not by itself determine the issue of what unit of employees might be appropriate for collective bargaining purposes under

other interests before an ultimate determination can be made.

(b) Cost of Collective Bargaining:

The administrative cost of collective bargaining is a factor that cannot be ignored by this Tribunal. The fact is that the Act imposes a structure of collective bargaining on existing employment relationships. From the employer's point of view, it is desirable that the structure of collective bargaining interfere as little as possible with its existing organization. For example, where managerial authority is centralized, a centralized collective bargaining structure would undoubtedly be less disruptive to the employer's organization.

The cost of collective bargaining can be felt in other ways as well. The process of collective bargaining itself consumes substantial resources of both the employer and the employee organization. The greater the number of bargaining constituencies, the greater the likelihood that the cost of collective bargaining will increase. Moreover, if bargaining units are too small, they may simply not be economically viable, so that employees are denied any real chance of organization.

(c) The Public Interest:

This Tribunal considers that in administering the Act it should not only take into account the interest of the parties directly affected, but it should also concern itself with the interest of the public at large. Collective bargaining under

this statute will have an impact on the functioning of government in Ontario. This Tribunal is concerned that the collective bargaining structure in the public sector shall complement, and hopefully enhance, the provision of government services for the people of Ontario. Thus, there is a clear and well-defined public interest present, that must be taken into account by this Tribunal when shaping the structure of public sector bargaining in Ontario. In our opinion, a structure providing for a strong, healthy, collective bargaining relationship between the employee organization and the employer is the one most likely to complement the functioning of government in Ontario. Such a relationship means that the parties come to the bargaining table on equal terms.

In the context of public sector bargaining, however, the concept of equal terms is somewhat different than in the private sector. Bargaining strength cannot be measured in economic terms, since the Act prohibits either party from resorting to economic sanctions - the strike in the case of the employee organization and the lock-out in the case of the employer. In the absence of the threat of such economic sanctions, each party at the bargaining table must argue its case on its merits alone, an exercise calling for both intensive research and skilful advocacy. In order for employees to be well represented in this exercise, it is obvious that their organizations must have sufficient resources to match the strong voice of the employer.

Consideration of the Facts

The considerations discussed above must now be applied to the facts brought out in this application. There are a number of facts that relate to the issue of community of interest. Public housing in Ontario is now located in 180 different municipalities scattered throughout this province, and housing units are planned for 28 additional municipalities. These housing units are presently administered through 80 administrative units under the control of Ontario Housing Corporation (O.H.C.). Local housing authorities account for 39 of these administrative units, while the other 41 administrative units are under the direct management of O.H.C. (The relationship between O.H.C. and the housing authorities will be explained at length below.) The local housing authorities have a jurisdiction restricted to the municipality in which they are located, while the direct management administrative unit may cover a number of municipalities, some of which may be many miles apart. All of these administrative units are primarily responsible for the day-to-day management of the housing units, and have the power to hire, fire, and supervise employees. The evidence indicates that there is little formal interchange of employees between administrative units. Although the above facts would indicate that the administrative units do have considerable authority over the employees for which they are responsible, their independence is somewhat curtailed by the fact that each of these administrative units must adhere to a salary budget set centrally by O.H.C. This budgetary control may account for

enjoyed terms and conditions of employment that were very similar, although not uniform. The evidence also indicates that the work performed and the skills possessed by the employees covered by the three applications were very similar to those possessed by employees at other administrative units in Ontario.

The applicant argued that considerations of community of interest supported the municipal bargaining units proposed by the applicant. In support of this argument, it was pointed out that considerable managerial control was exercised at the local level; that geographical distances dictated municipal bargaining units; and that employees would have greater freedom of choice with municipal bargaining units. There are, however, a number of factors indicating a wider community of interests. The fact is that public housing in Ontario is not strictly organized along municipal lines. For example, the local O.H.C. administrative units are not municipal units, but instead cover a number of municipalities. Thus, it could just as well be argued that the community of interest extends to all employees in the local administrative units, rather than being confined to employees in a particular municipality. Once it is argued that the community of interests extends to all employees within the administrative unit, however, geographical differences then become less significant, since some of the administrative units encompass more than one municipality.

Taking a somewhat different tack, it can also be argued that geographical differences are not as important in defining a community of interest in the public sector. Existing patterns of

public sector collective bargaining, of which this Tribunal takes judicial notice, indicate that Crown employees tend to organize along provincial lines. Certainly the majority of public sector bargaining units in Ontario that came into existence before the promulgation of the Act support this observation. Employees of the public service, of the Ontario Provincial Police, of the Liquor Control Board and Liquor Licence Board, and of the Ontario Community Colleges have all formed provincial-wide units. The only real exception to this general trend is the bargaining unit comprised of the employees of the Ontario Housing Corporation in Metropolitan Toronto. The organization of this latter group of employees into a municipal unit can be explained by the fact that this unit was created at a time when the employees affected were not Crown employees.

This Tribunal also takes judicial notice of the fact that organization of Crown employees in other Canadian provinces has tended to be along provincial lines. This pattern of organization makes sense in light of the fact that terms of employment and working conditions for Crown employees tend to be uniform throughout a province. Moreover, the actual amount of money allocated for the salaries of these employees is very much a decision of central government. Both these considerations apply to a significant extent to the employees affected by these applications. The fact is that conditions of employment for these employees are substantially similar throughout the province, even though there may be some slight differences. Even more important is the fact that the real paymaster, O.H.C., is centrally located. In view of these considerations, we are not convinced

in this case that considerations of community of interest dictate local bargaining units as being appropriate.

The applicant also pointed out that, within Metropolitan Toronto, management duties for some public housing projects had been contracted-out to certain private firms in the business of property management and that, where applications had been made to the Ontario Labour Relations Board for the certification of bargaining agents for the employees working for these firms, the Board had recognized that a bargaining unit of employees at a particular site was appropriate. This fact was used to support the applicant's argument that the O.H.C. structure was amenable to multiple bargaining units of a local nature. This Tribunal, however, does not consider such an argument to be persuasive, since it only indicates that a certain collective bargaining structure might be suitable if the management function were performed by a private employer. The fact is that we are dealing with a public employer and we must only take into account considerations relevant to the public sector.

Consideration of the cost of collective bargaining requires a closer look at the organization of public housing in Ontario. Initially, public housing schemes were regulated by means of a series of agreements made under the authority of The National Housing Act, 1944, R.S.C. 1970, C. N-10, and The Housing Development Act, R.S.O. 1970, c.213. Under these arrangements a partnership agreement was first made between the Federal Government, the Province of Ontario, and Central Mortgage and Housing Corporation (Exhibit 2). Following this

agreement, a development agreement was made between the Province of Ontario and Central Mortgage and Housing Corporation and the municipality involved (Exhibit 3). To provide for the management of the project once it was built, a management agreement was then entered into between the Province of Ontario and Central Mortgage and Housing Corporation (the partnership) and the local housing authority concerned (Exhibit 4). These local housing authorities were created by Orders-in-Council made under section 6 of The Housing Development Act and were given wide management discretions by that Act (Exhibit 5). (Apparently, these authorities were not regarded as Crown agencies, since Local 767 of the Canadian Union of Public Employees were certified by the Ontario Labour Relations Board as bargaining agent for employees of the Metropolitan Toronto Housing Authority.) This initial arrangement for public housing in Ontario was commonly known as the "F.P. arrangement".

In 1964, the organizational structure was altered by the creation of the Ontario Housing Corporation. This Crown agency, established under The Ontario Housing Corporation Act, R.S.O. 1970, c. 317, fell heir to all the rights and obligations previously incurred by the Province in respect of public housing. The result was that O.H.C. was substituted as a party to those agreements made under the F.P. agreement. Even more significant is the fact that the establishment of O.H.C. caused substantial changes in the existing organizational structure. Although the local housing authorities did not disappear (with the exception of the Metropolitan Toronto Authority), these

housing units established after 1964. Under the new arrangement, the financing of public housing in Ontario was altered and title in the projects belonged to O.H.C. Where these new housing units were located in municipalities where local housing authorities were present, responsibility for the management of these units fell to these local authorities. For this purpose, a management agreement would be entered into between O.H.C. and the local housing authority (Exhibit 9). Under this arrangement, commonly known as the "O.H. arrangement", the managerial powers of the local housing authorities were more restricted than in the case of the F.P. arrangement. For example, under the O.H. arrangement rents received were paid directly to the O.H.C. bank account, and day-to-day expenses were handled by means of an imprest account with revolving float. Larger purchases were handled by means of purchase orders that had to be submitted to the Ontario Housing Corporation. Under the O.H. arrangement local authorities were restricted from entering into any contract under which the authority assumed on behalf of the Corporation any liability which was to continue for a period of longer than one year. Due to the expansion of public housing after 1964, the number of housing units managed by the local authorities under the O.H. arrangement came to surpass the number of housing units managed under the F.P. arrangement. Local housing authorities now manage 16,811 housing units under the O.H. arrangement, as compared to 3,660 housing units under the F.P. arrangement. Thus, the 39 existing local authorities are now primarily concerned with management of O.H. units, and, as a result, appear to have come increasingly

housing was constructed in municipalities where no housing authority existed, O.H.C. assumed managerial control through one of its local administrative units. In all, 7,404 housing units are managed directly through 41 local administrative units of O.H.C.

The Tribunal concludes that the establishment of O.H.C. has resulted in substantial control being asserted by this organization over the administration of public housing in this province. Although this central body plays a limited role in the day-to-day management of public housing in Ontario, especially in the case of units under the F.P. arrangement, it is quite clear that it does have budgeting control over both the F.P. and O.H. projects. There is no doubt in our minds that the important financial decisions relating to public housing are now made centrally. The fact that financial control is centralized is clearly relevant to a decision as to the appropriateness of the bargaining unit. If public sector collective bargaining is to be carried on successfully, it is most important that the paymaster be present as a party at the bargaining table. The existing organizational structure of public housing in Ontario clearly indicates that the paymaster is O.H.C. The imposition of a collective bargaining structure comprised of local bargaining units might possibly disrupt the existing organizational structure and create the undesirable effect of reducing the role of O.H.C. at the bargaining table.

Another possibility, of course, is that O.H.C. could

bargain directly with local bargaining units. This would mean, however, a multiplicity of separate negotiations on behalf of a small number of employees. There are less than 600 employees working at public housing sites outside of Toronto that are eligible for collective bargaining under this Act and there are 80 local administrative units involved. If this Tribunal were to sanction collective bargaining at the local level in these three applications, then logic would lead to the possibility of 80 separate bargaining units, many of them containing only 1 or 2 employees, scattered throughout Ontario. The disadvantages of such a fragmentation appear clear. There is no doubt in our minds that the administrative cost of such a structure would be unreasonable, heavily taxing the resources of both the employer and the employee organizations involved. There would also be the distinct possibility that employees at certain of these locations would never have the chance to be organized, since their bargaining unit would not be economically self-sustaining.

The facts must finally be considered in relation to the public interest. In our opinion, the public interest of Ontario is best served by a strong, stable collective bargaining relationship between employers and employee organizations in the public sector. It would be undesirable to create a situation where one party does not have the resources to properly carry out its collective bargaining function, since reason and common sense are more likely to prevail when the parties come to the table as experienced equals. Applying this consideration to the instant

applications, it would appear that local bargaining units in this situation would simply not be able to command the resources to properly carry out the collective bargaining function. Thus, considerations of public interest do not support the bargaining units proposed by the applicant.

Taking all the above considerations into account, this Tribunal concludes that the bargaining units proposed in the three applications are not units of employees that are appropriate for collective bargaining purposes under the Act. In the present case, the Tribunal considers it proper to not only deny the units proposed by the applicant, but also to indicate the appropriate unit for those employees affected by these applications. In our opinion, the appropriate unit for these employees would comprise all employees of the Ontario Housing Corporation and of all housing authorities in the Province of Ontario employed outside of Metropolitan Toronto, except for those persons employed in a managerial or confidential capacity.

There is one further matter with which this Tribunal must deal. At the close of its submission, the employer requested that this Tribunal exercise its discretion under s. 39(1)(e) of the Act and bar any new applications relating to any of the employees affected by the three applications. In support of its request, the employer argued that it should be saved the expense of any new applications for at least 10 months in view of the expenses already incurred by the instant applications. Section 39(1)(e) gives this Tribunal the power "to bar an unsuccessful applicant for any period not exceeding 10 months from the date of

the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by the employees affected by an unsuccessful application or by any person or employee organization representing such employees within any period not exceeding 10 months from the date of dismissal of the unsuccessful application". The purpose of this provision, in our opinion, is to give the Tribunal a power to control vexatious applications from employee organizations. For example, it would seem unfair that a collective bargaining relationship between an employer and an incumbent employee organization should be disrupted by continued applications from some other employee organization, or that an unsuccessful employee organization be allowed to continue a series of applications where there was no real likelihood of their success. In the present situation, however, there appears to be no justification for exercising our discretion in this matter. Since we have rejected the bargaining unit proposed by the applicant and indicated what we consider to be the appropriate unit, it would only seem fair to allow the applicant, or any other employee organization, the immediate opportunity to apply for the unit that we consider appropriate. Although this may put the employer to some additional cost, this cost would appear to be one of the normal costs of collective bargaining, and one that must be accepted if collective bargaining as envisaged by the Act is to function properly. Accordingly, the employer's request is rejected.

DATED at Toronto this 11th day of October, 1973.

T/2/74
T/9/73-1

IN THE MATTER OF THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1972

AND

AN APPLICATION BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES
Applicant

and

THE CROWN IN RIGHT OF ONTARIO
(WORKMEN'S COMPENSATION BOARD OF ONTARIO)
Respondent

and

CERTAIN PERSONS EMPLOYED AS OCCUPATIONAL THERAPISTS, CLINICAL PHYSIOTHERAPISTS, PSYCHOMETRISTS, REMEDIAL GYMNASTS, AND RADIOLOGICAL TECHNICIANS
Intervener

and

CERTAIN PERSONS EMPLOYED AT THE HOSPITAL AND REHABILITATION CENTRE, DOWNSVIEW
Intervener

BEFORE: Judge Walter Little, Chairman
Professor D. D. Carter, Adjudicator

DATE OF HEARING: June 14, 1974

APPEARANCES FOR THE APPLICANT:

M. Hikl, Legislative Director
S. R. Hennessy, Counsel

APPEARANCES FOR THE RESPONDENT:

C. G. Riggs, Counsel

APPEARANCES FOR PERSONS EMPLOYED AS OCCUPATIONAL THERAPISTS, et al:

M. Gordon, Counsel

APPEARANCES FOR PERSONS EMPLOYED AT HOSPITAL AND REHABILITATION CENTRE:

Ward Seeley, An Employee

DECISION

The applicant, the Canadian Union of Public Employees, has applied for representation rights in respect of employees of the Workmen's Compensation Board. This decision deals with the issue of whether the applicant has status as an employee organization, as defined in the Crown Employees Collective Bargaining Act, 1972, S. O. 1972, C. 67 (the Act). More specifically, the question is whether the applicant meets the requirements for employee organizations set out in s. 1(1) (h) of the Act. A determination of the status of the employee organization is fundamental to the application since only qualified employee organizations may seek and obtain representation rights under the Act. Before dealing with the merits, it will be valuable to summarize the history of the application.

On October 3, 1973, the Canadian Union of Public Employees formally applied to the Tribunal for representation rights in respect of employees of the Workmen's Compensation Board. Included in the application was an affidavit signed by both the National President and National Secretary-Treasurer of the applicant to the effect that the applicant was at all times qualified as an employee organization under the Act. On October 12, 1973, the Tribunal directed that November 9, 1973, be fixed as the terminal date, and that the application be heard on November 22, 1973. Subsequently, notices of intervention were filed by eight safety associations and two separate groups of employees. At the November 22 hearing, these interveners raised a number of issues relating to the validity of the application, one of which was the question of the applicant's status. (The Tribunal's notes from that hearing indicate that Mr. Gordon, representing an intervening group of employees, requested copies of the applicant's financial statement and submitted that the onus was on the applicant to establish that it was qualified under s. 1(1) (h) of the Act.) Two issues of a preliminary nature,

one relating to the status of the safety associations, and the other relating to the extent of the exclusion of professional employees under the Act, were heard by the Tribunal at this hearing. The Tribunal reserved its decision, and subsequently resolved these two issues in a written decision, dated December 31, 1973.

That decision, however, still left a number of issues outstanding. In order to deal with the difficult issue of exclusions from the bargaining unit, the Tribunal, on December 18, 1973, appointed an inquiry officer to inquire into the work situation of certain groups of employees. Before completion of this inquiry, the issue of the applicant's status was again raised by Mr. Gordon in a letter to the Tribunal, dated January 31, 1974. In order to establish a procedure to deal with this issue, and to resolve certain problems arising from the inquiry, the Tribunal met with the parties on February 20, 1974. At that meeting, the Tribunal took the position that an affidavit in Form 3 should be taken as prima facie evidence that an applicant is a qualified employee organization, but that any person challenging the status of an applicant should be entitled to cross-examine one or both of the deponents on the statements contained in the affidavit. It was agreed by counsel that a mutually acceptable date for the cross-examination would be arranged among themselves. The cross-examination of Mrs. Grace Hartman took place on March 19, 1974. The transcript of the cross-examination was not received by the Tribunal until May 13, 1974. At that time, certain undertakings to produce documentary material had not been fulfilled by the applicant. Subsequently, the Tribunal informed the parties that a hearing to deal with the issue of the status of the employee organization would be held on June 14, 1974, provided that the undertakings were fulfilled before that time. The undertakings were fulfilled and the matter was heard on June 14.

At the hearing, it became apparent that the disposition of the issue of status would depend upon the interpretation of the applicable law, rather than upon determinations of fact. There was no dispute over the accuracy of the testimony given at the cross-examination and, in fact, counsel for the respondent pointed out that the testimony had been given in a frank and honest manner. The evidence, however, does raise certain legal implications that will now be dealt with at length.

The most important piece of evidence is the fact that the applicant is a national organization with a membership of approximately 180,000 employees spread throughout Canada. The objects of the union, formally spelled out in the constitution, point especially to its national character. Article 2 states:

> "2.1 The Union has as its objectives:
>
> (a) The organization of workers generally, and in particular all workers in public service in Canada.
>
> (b) The advancement of the social, economic and general welfare of public employees.
>
> (c) The defence and extension of the civil rights and liberties of public employees and the preservation of free democratic trade unionism from attack or infiltration by Communists, Fascists or other hostile subversive influences.
>
> (d) The improvement of the wages, working conditions, hours of work, job security and other conditions of public employees.
>
> (e) The promotion of efficiency in public service generally.
>
> (f) The promotion of peace and freedom in the world, and the co-operation with free and democratic labour movements throughout the world.
>
> 2.2. The objectives of the Union are to be accomplished through the following methods.
>
> (a) Establishing co-operative relations between employers and employees.
>
> (b) Promoting required desirable legislation.
>
> (c) Conducting an educational program designed to enlighten the general public with respect to the

problems of public employees.

(d) Organizing and supporting central and provincial bodies of public employees for dealing with matters peculiar to a particular area or province and for assisting in the organizational efforts of this Union.

(e) Co-operation with the Canadian Labour Congress, its chartered federations and Labour Councils, its affiliates and its departments in furthering the general well-being of the whole Labour Movement.

(f) Co-operating with the Public Service International and the International Confederation of Free Trade Unions in their work".

Article 3 of the constitution, dealing with jurisdiction and membership also reveals the national character of the organization:

"3.1 Any group of the following employees shall be eligible for membership as Chartered Local Union:

Employees of any Federal, Provincial or Municipal Government, or Local Authority, or any subdivision thereof.

Employees of any Public Board or Commission established by or related to the Municipal Authority.

Employees of any Public Board, Commission or Authority of the Federal or any Provincial Government.

Employees of any Hospital, Social or Welfare Agency established to serve a community.

Employees of any Public Utility whose charges or rates to the public come under the supervision of a Governmental Body or Agency."

The final part of Article 3 reveals that the applicant may serve as an umbrella organization under which operate local organizations:

"The Canadian Union of Public Employees may issue charters to all groups eligible for membership as a Chartered Local Union.

The Canadian Union may issue charters and accept into membership in good standing all employees groups that so wish in cases where these groups of employees are recognized under existing labour legislation."

The national character of the applicant has serious implications in the context of The Crown Employees Collective Bargaining Act. The opening

paragraph of s. 1(1) (h) states that " 'employee organization' means an organization of employees formed for the purpose of regulating relations between the employer and employees under this Act...". The Tribunal considers that these words indicate a legislative intent to restrict the goals of organizations representing Crown employees. A comparison of the language in s. 1(1) (h) with that found in s. 1(1) (n) of the Labour Relations Act, R. S. O. 1970, c. 232, supports this interpretation. The Labour Relations Act defines a trade union as "an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national or international trade union and a certified council of trade unions". It is reasonable to assume that, if the legislature intended that employee organizations under the Act were to have the same scope for their operation as trade unions under the private sector legislation, then language similar to that contained in the Labour Relations Act would have been employed. It is also interesting to note that the New Brunswick Public Service Labour Relations Act, 1968 S.N.B., c. 88, referred to by the applicant contains the type of language found in the Labour Relations Act, merely requiring that regulation of relations between the government and its employees be included as one of the purposes of the employee organization. The language of the Crown Employees Collective Bargaining Act, however, dictates a much narrower range of purposes for employee organizations requiring the formal goals of organizations to relate solely to the regulation of relations between the provincial government and its employees.

The Tribunal does not consider such a requirement to be a mere technicality In the context of public sector collective bargaining there are good reasons for narrowing the goals of employee organizations. Public sector collective bargaining requires the government, while still acting as governor, to play

the role of employer. This means that any system of public sector collective bargaining must not only take into account the legitimate interests of government employees, but the equally legitimate interest of the public in protecting the government's power to govern. It is inevitable that these two goals may sometimes conflict. In Ontario, the Crown Employees Collective Bargaining Act provides the rules under which such conflicts are to be resolved. There is a considerable difference between this legal structure and the structure provided by the Labour Relations Act for the regulation of private sector collective bargaining. Moreover, many of the approaches taken in the Crown Employees Collective Bargaining Act differ from approaches taken by other Canadian jurisdictions in dealing with collective bargaining by government employees. The Crown Employees Collective Bargaining Act, by restricting the purposes of employee organizations, attempts to insulate public sector collective bargaining in Ontario from the distorting influences of other collective bargaining structures and especially from those devised for the private sector. The beneficial effects of such insulation cut two ways, since to force an employee organization into the mould required by the Act, might pervert any role that such an organization might be performing concurrently in the private sector.

On the other hand, the Tribunal does not read the restriction upon employee organization goals as requiring these organizations to be completely parochial. The requirements of an organizational structure dedicated to the purpose of regulating relations between the employer and employees under this Act does not mean that such a structure cannot be related to a parent body committed to wider concerns, or affiliated with a confederation of trade unions with broader interests. In fact, s. 44 of the Act dealing with trusteeship clearly envisages that there may be parent-local relationships. The important point is that there be a separate organizational structure dedicated solely to regulating relations between employers and employees under the Act.

The existence of such a structure would be sufficient to distinguish the role that must be performed by the employee organization from any wider roles that might be played by the parent organization.

Furthermore, the Tribunal does not consider that an employee organization, to qualify under section 1 (1) (h), must be formed after the Act came into force. The paramount consideration is not the time of formation but, rather, the purpose for which the organization is formed. In the opinion of the Tribunal, any organization formed at any time for the purpose of representing Crown employees in Ontario would meet the requirements contained in the opening paragraph of section 1 (1) (h).

Given the pronounced national aspirations of the applicant, can it be said that it is an organization "formed for the purpose of regulating relations between the employer and employee" under this Act? In the opinion of the Tribunal the answer is clearly no. The evidence indicates that the applicant has wider concerns than representing Crown employees in Ontario, creating the possibility of a conflict of roles. This is a defect that disqualifies the applicant from legal recognition under the Act. Moreover, it is a defect that cannot be cured by the creation of a separate local organization subsequent to certification, as suggested by the applicant, since the certificate would still be held by the national organization. In the opinion of the Tribunal, the initial chartering of a local for the purpose of organizing the employees would have been the proper course to follow.

Those provisions of section 1 (1) (h) restricting political activities of employee organizations were the subject of considerable argument at the hearing. Although an interpretation of this part of the Act is not strictly necessary for the disposition of this matter, the Tribunal considers that, for the benefit of future applicants, it is advisable to comment upon these restrictions.

Section 1(1) (h) disqualifies any employee organization that:

> "(i) receives from any of its members who are employees any money for activities carried on by or on behalf of any political party,
> (ii) handles or pays in its own name on behalf of members who are employees any money for activities carried on by or on behalf of any political party,
> (iii) requires as a condition of membership therein the payment by any of its members who are employees of any money for activities carried on by or on behalf of any political party,
> (iv) supports or requires its members who are employees otherwise to support any political party."

The Tribunal considers that the legislature, in enacting these restrictions, intended that the collective bargaining process in the public sector of Ontario should be insulated from party politics. In other words, it was intended that employee organizations and provincial political parties, either in power or out of power, be kept at arm's length. Collective bargaining, if it is to function properly requires that the parties at the bargaining table be present as protagonists, not as allies. The restrictions on political activity do not mean that bargaining agents cannot make their own appeals to the public, as it must be recognized that public advocacy is an essential characteristic of public sector collective bargaining. Such appeals, however, must not be a partisan political nature since, otherwise, there is the real possibility that political alliances may create a conflict of interest at the bargaining table.

In order to prevent such a conflict of interest, the legislature enacted the restrictions contained in s. 1(1) (h). Especially broad is the provision that disqualifies any employee organization that "supports or requires its members who are employees otherwise to support any political party". In the opinion of the Tribunal, this provision prohibits any form of support, either monetary or non-monetary, given either directly or indirectly. Employee organizations must stay completely clear of provincial party politics.

On the other hand, the Tribunal considers that the restriction on political activity is confined to political activity at the provincial level. The Tribunal is aware of the decision of the Supreme Court of Canada in Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.(1964), 41 D.L.R. (2d) 1, in which a majority of the court held that restrictions upon trade union support for political parties could extend beyond the provincial level. In that case, the court construed a restriction contained at that time in the British Columbia Labour Relations Act as being intended to protect the civil rights of employees represented by trade unions. The Tribunal considers that the much wider restrictions found in the Crown Employees Collective Bargaining Act are not intended to protect the civil rights of individual employees, although this may be a result, but to preserve the integrity of the collective bargaining process in the public sector of Ontario. It is political activity by employee organizations at the provincial level, that would impair this process. Thus, any employee organization that, subsequent to the coming into force of the Crown Employees Collective Bargaining Act, supports any provincial political party will be subject to disqualification.

Finally, the Tribunal wishes to comment upon the time required to process this application. Although it is obviously desirable from the applicant's point of view to obtain representation rights quickly, the Tribunal has a public duty to administer the legislation properly. This means that the Act must be interpreted according to the intention of the legislature and that other persons affected by the application be given the opportunity to be heard. With these considerations in mind, the Tribunal has in all cases taken the position that applications should be processed as quickly as is consistent with the proper administration of the Act and basic rules of natural justice.

It must also be recognized that legislation in its period of infancy often gives rise to problems of interpretation, and that the resolution of such problems takes time. The Tribunal considers it regrettable, but inevitable, that in certain cases an erroneous interpretation of legislation by a person affected may cause inconvenience to that person. Recognizing this fact of life, the Tribunal in earlier decisions has taken the position that, at this early stage in the administration of the legislation, it should exercise any discretionary power to reduce such inconvenience.

In this case, the Tribunal has determined that the applicant is not an employee organization falling within the meaning of the Crown Employees Collective Bargaining Act. As a result, the application must be dismissed.

Consideration has been given to the applicant's request for leave to amend the application under Rule 41 of the Rules of Procedure. The defect in this application, however, is of such a substantial nature that the Tribunal does not consider that it can be cured by merely amending the application. The fact is that the membership evidence received by the Tribunal relates entirely to an organization that does not qualify under the Act. The nature of this evidence cannot be changed by an amendment to the application, but only by a fresh application from a qualified employee organization.

Finally, the Tribunal must consider whether to exercise its discretionary power under section 39 (1) (e) of the Act to refuse to entertain any new applications within any period not exceeding ten months. In its opinion, the circumstances do not warrant such a bar. This is clearly a case of an application failing as the result of a misinterpretation of the Act, and there is no good reason why a qualified employee organization should be restricted from immediately making a fresh application.

DATED at Toronto this 28th day of June, 1974.

Judge Walter Little
Chairman of the Tribunal

T/9/73-2
T/9/73

IN THE MATTER OF THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1972

AND

IN THE MATTER OF THREE APPLICATIONS FOR REPRESENTATION RIGHTS BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1750, EMPLOYEES OF THE WORKMEN'S COMPENSATION BOARD

Applicant

- and -

THE CROWN IN RIGHT OF ONTARIO, (WORKMEN'S COMPENSATION BOARD)

Respondent

- and -

NURSES' ASSOCIATION WORKMEN'S COMPENSATION BOARD HOSPITAL AND REHABILITATION CENTRE

Intervener and Applicant

- and -

ASSOCIATION OF ALLIED HEALTH PROFESSIONALS: WORKMEN'S COMPENSATION BOARD OF ONTARIO

Intervener and Applicant

BEFORE: Judge Walter Little, Chairman
Professor D.D. Carter, Adjudicator

DATES OF HEARING:

September 27, 1974 and January 10, 1975

IEE 1-2/75

APPEARANCES:

September 27, 1974

C. Brownell, D. McAllister, M. Falco, G.O. Jones, A. Riseley, S.R. Hennessy and M. Hikl for Local 1750.

D.F.O. Hersey, Mrs. Julia Daley and Mrs. Loretta Conlogue for Nurses' Association.

J.A.B. Macdonald and D.H. Carruthers, Q.C., for Association of Allied Health Professionals.

C.G. Riggs and J.G. Betts for Workmen's Compensation Board.

January 10, 1975

M. Hikl and W. Acton for Local 1750.

D.F.O. Hersey and Mrs. Julia Daley for Nurses' Association.

Michael Gordon and Allan Robertson for Association of Allied Health Professionals.

C.G. Riggs, J.G. Betts and W.J. Gorchinsky for Workmen's Compensation Board.

Decision

The Applications

The applicant, Canadian Union of Public Employees, Local 1750, seeks representation rights for "All employees of the respondent ---- save and except supervisors and persons above the rank of supervisor, and persons excluded by the Crown Employees Bargaining Act."

The intervener and applicant, Nurses' Association Workmen's Compensation Board Hospital and Rehabilitation Centre, seeks representation rights for "All registered and graduate nurses employed by the respondent at the Workmen's Compensation Board Hospital and Rehabilitation Centre in Metro Toronto save and except the assistant superintendent and those above the rank of assistant superintendent."

The intervener and applicant, Association of Allied Health Professionals: Workmen's Compensation Board of Ontario, seeks representation rights for "all physiotherapists, occupational therapists, speech therapists, remedial gymnasts, clinical psychologists or psychometrists, therapeutic and/or non-supervisory administrative dietitians, radiographers, social workers and audiologists in the employ of the respondent at the Workmen's Compensation Board Hospital and Rehabilitation Centre in Metropolitan Toronto, save and except supervisors exercising managerial functions and persons above that rank."

The respective applications include in their proposed units 1,000, 23 and 58 employees respectively. It was agreed at

the hearings, however, that the number in the large unit was not exact.

The application by Local 1750 was received on July 26, 1974, the intervention and application by the Nurses' Association on August 16, 1974, and the intervention and application by the Allied Health Professionals on August 27, 1974. No other interventions or applications were received.

The initial hearing to deal with these applications was convened by the Tribunal on September 27, 1974. Evidence was adduced as to the proceedings of a meeting of employees of the respondent, which was called for the purpose of creating Local 1750. A resolution establishing the Local was passed, a constitution and by-laws were adopted and a temporary executive elected pending the application for representation rights. The applicant-interveners then introduced evidence as to the proceedings taken to create their respective organizations amongst employees at the respondent's Hospital and Rehabilitation Centre in Metropolitan Toronto. The Tribunal next received evidence relating to the status of each of the applicants as an "employee organization" as defined in S.1(1(h)) of the Act. After hearing witnesses and argument in this regard the Tribunal was satisfied that each applicant did qualify as an "employee organization" and ruled accordingly at that time.

The Issue

The issue before the Tribunal is the appropriateness of the bargaining units proposed by the applicant, respondent,

and the two intervener applicants. In determining this issue, the Tribunal must consider 3 possibilities: 1) a single bargaining unit comprised of all employees of the Board, as proposed by the applicant and respondent; 2) three bargaining units created by carving out from the all-employee unit the two units proposed by the two intervener-applicants; 3) two bargaining units created by carving out from the all-employee unit a single unit comprised of nurses and health professionals.

The Tribunal was informed by the applicant that it did not intend to adduce any evidence other than the membership cards filed with the application, the secrecy of which must be maintained by virtue of s.49(1) of the Act. The Tribunal then ruled, because this evidence could not be disclosed to the other parties, it could not be used to establish the appropriateness of the proposed bargaining units. Counsel for the Allied Health Professionals then moved that the application of Local 1750 be dismissed for lack of evidence. At that point, counsel for the respondent indicated that the employer was prepared to introduce evidence as to the appropriateness of the all-employee unit. The Tribunal ruled that a motion for non-suit was not appropriate in the circumstances. The proceedings to establish an appropriate bargaining unit involve more than merely resolving a dispute between competing applicants. The Tribunal's decisions on these matters affect the employer as well and, what is more important, affect the overall structure of collective bargaining in the public sector of Ontario. The motion was accordingly dismissed.

The Tribunal then informed the parties that it intended

to appoint an inquiry officer to inquire and report into the appropriateness of the proposed bargaining units and for this purpose to receive all evidence which the parties wished to adduce in this regard. On October 17, 1974, William G. Jackson was appointed inquiry officer and evidence was received by him on October 28 and 29 and November 7 and 8, 1974. He reported to the Tribunal on December 9 and a transcript of the evidence was received at approximately the same time. On December 19, 1974, January 2 and January 3, 1975, counsel for the Allied Professionals, Local 1750, the respondent and the Nurses' Association respectively, indicated they wished to make representations to the Tribunal on the contents of the Report and as to the conclusions which the Tribunal should draw from it. The Tribunal accordingly fixed January 9, 1975 to hear submissions of counsel in this regard.

At the commencement of this hearing counsel for the Allied Professionals requested permission to call one further witness whom he had subpoenaed, Dr. John S.W. Aldis, Chief Executive Officer of the Project Development Group in the Ministry of Health, with regard to community health services. He wished particularly to inquire of the witness what bargaining units in the health field he would consider to be in the public interest. After hearing representations by all counsel the Tribunal decided that the witness would be permitted to testify on matters of fact only, since the matter of public interest was something for the Tribunal to decide and not a matter upon which opinion evidence should be received.

The Basis of our Consideration

The Tribunal first considered the matter of appropriate bargaining units for the public sector in Ontario Housing Employees' Union Local 767 C.U.P.E. and the Crown in Right of Ontario (Ontario Housing Corporation - Windsor, Oshawa and Hamilton Housing Authorities.) In that decision dated October 11, 1973, after reviewing our powers under the Act to deal with this matter, we concluded that the relevant considerations should be grouped under three general headings: (a) freedom of association and community of interest; (b) cost of collective bargaining; (c) the public interest. Accordingly, the submissions in the matter now before us dealt with the application of these considerations to the facts established by the evidence. In making these submissions both the applicant and the respondent maintained their initial position that the bargaining unit proposed by Local 1750 should be adopted by the Tribunal while the applicant interveners argued that separate units be established for the nurses and health professionals or, in the alternative, that one bargaining unit be created for them separate from a main unit comprising the remainder of the employees.

The Arguments

On behalf of the applicant Mr. Hikl submitted that the decision relating to the Ontario Housing Corporation should be followed in this case. In support of this position he emphasized the trend towards larger bargaining units both in the public and private sectors. He further argued that this was particularly

desirable where there was a common employer with employees throughout the province, permitting centralized bargaining which would lead to greater convenience and administrative efficiency for all involved. According to Mr. Hikl, the employees of the respondent have a common objective - to rehabilitate victims of industrial accidents - and thus have a broad community of interest. He also referred to the fact that terms and conditions of employment for all employees are similar; that employee benefits such as holidays, vacations, Ontario health insurance, standard health care, life insurance, long-term disability, sick leave and attendance credits, pension plan, tuition assistance, leaves of absence and access to early retirement are identical for all employees irrespective of their classifications. He further argued that the respondent's budget is centrally controlled; that neither of the interveners had demonstrated that a single bargaining unit would be unmanageable; that the applicant had at its disposal the technical skills, expertise and resources of a strong union; and, finally, that the interests of all the employees, as well as the public interest of all the people of Ontario, would be best served by the stability which the applicant could provide.

The position taken by the applicant was supported by Mr. Riggs on behalf of the respondent. In particular, he applied the criteria adopted by the Tribunal in the Ontario Housing Corporation decision, making the following arguments:

1. Freedom of Association and Community of Interest

   (a) Performance of similar work utilizing similar skills

   The unique and special purpose of the Board meant that

all employees were involved in the treatment, rehabilitation and compensation of the victims of industrial accidents. It was a common bond amongst them. Different skills complemented each other. Some were acquired by advanced education and training, e.g. accountants and data processors, but others acquired in a less formal way were just as necessary. The Act, although excluding certain types of professionals from collective bargaining, does not exclude nurses and health professionals, indicating that it was not intended to confer special status upon these two groups of employees. Evidence of the unity of the treatment team was not too helpful as some of the allied health professionals - psychologists, social workers, radiological technicians and remedial gymnasts were not part of the team, while other individuals such as rehabilitation counsellors closely associated with the team were not included as health professionals. Likewise, the nurses' group did not include registered nursing assistants. If the Tribunal should set the precedent of recognizing small groups it would open the door for other groups claiming to be professionals.

(b) The application of similar or substantially similar conditions of employment.

This is clearly established by the long list of employee benefits common to all.

(c) Common direction and control by employer.

The nature of the Board organization is in the form of a pyramid with controlled decision-making from the top.

There are six Divisions all with Branches and Branch heads reporting to Division heads and thence to the Executive Director. All employees are in one of the Divisions and one of the Branches. Everyone at the Rehabilitation Centre reports to its Director, who is a Branch Head. The Board is province-wide but there is central budgetary control and all payments are made by one agency. The personnel function is system-wide, there being no separate fiefdoms. This results in economies and efficiencies benefiting employer and employees alike, and ensuring similar treatment for all employees.

(d) Geographical proximity of employees to each other.

Only 20% of the employees are at the Rehabilitation Centre and only one-quarter of these are represented by the interveners. The remainder are either excluded from bargaining or included in the applicant unit.

(e) Existing patterns of collective bargaining in the public sector.

Although in other Canadian jurisdictions, bargaining is divided amongst a number of bargaining agents, these applications must be considered in relation to the pattern already established in the Ontario public sector. The Act and the Regulations created thereunder indicate the pattern considered to be appropriate by the Legislature in establishing bargaining units. The entire public service has by Regulation one bargaining unit, containing employees performing similar jobs to those represented by the

interveners. The legislature obviously considered this to be in the public interest.

Finally, counsel submitted that in the case of a hierarchial structure such as the Board, the cost in time, money and manpower is reduced by having one bargaining unit. If one or two additional bargaining units resulted from the interventions separate negotiations would be necessary. In addition, the distinct possibility of "whipsawing" would destroy harmonious relations with the employer. Therefore, one bargaining unit for all employees was most appropriate.

On behalf of the Nurses' Association, Mr. Hersey in reply initially emphasized that the federal government and several of the provinces and tribunals appointed by them to determine appropriate bargaining units had recognized that nurses and other such professional groups were entitled to be recognized in separate bargaining units. Furthermore, no tribunal had ever placed nurses in the same bargaining unit with others. This attitude was just as pronounced as the trend towards larger bargaining units referred to by the applicant. In hospitals throughout Ontario in which employees were organized, the Ontario Labour Relations Board had regularly ruled that a number of bargaining units in the same hospital was appropriate and nurses had been separately recognized in this way. In concluding his reply he pointed out that, although professionals, as defined in S.1(g)(4), were excluded from bargaining, the Act did not state that other professional groups such as nurses could not be formed into separate bargaining units.

In making his submissions in chief Mr. Hersey argued that the legislature, despite its action in creating only one public service bargaining unit, had given to the Tribunal the widest discretion to decide appropriate bargaining units in applications such as this. No doubt as to our jurisdiction had been raised by anyone so we were free to act as we considered best. That decision should be based on wise industrial relations policy.

Counsel then addressed himself to the criteria set out in the Ontario Housing Corporation decision:

1. Freedom of Association and Community of Interest

   (a) Performance of similar work utilizing similar skills.

This was self-evident. A thorough consideration of the evidence, and particularly that of the doctors and nurses, established beyond question that their work as members of medical teams was separate and distinct from the work of other employees with whom they were associated from time to time, e.g. registered nursing assistants, rehabilitation counsellors, orderlies, housekeepers and staff and maintenance staff. Nurses were professionals with a unique background and skills and must be considered separately. There was a distinct cleavage between the medical and non-medical groups; between those who actually treated the patients medically and those who merely complemented the work of the professionals by doing other necessary but non-similar jobs.

(b) The application of similar or substantially similar, conditions of employment.

While admitting that a long list of employee benefits were enjoyed in common with all other employees it was equally clear that the nurses were unique in that they alone must be available twenty-four hours a day, seven days a week, and their shifts were separate and distinct from those of any other group of employees. In addition, one of the conditions of employment was that they be registered nurses; that to qualify as such they must have successfully completed the nurses' training course following secondary school and they must maintain their professional standing as nurses in order to hold their jobs. They must continue to upgrade themselves by continued education and be subject to discipline by their professional association if they fail to do so. There was no evidence that any other group of employees had to meet these standards as conditions of employment.

(c) Common direction and control by the employer.

It was agreed that this existed for all employees but as professionals nurses had a duty to patients over and above their duties to the employer and, if a conflict arose, the nurses' duty to patients must be paramount.

(d) Geographical proximity of employees to each other.

All were located at the Board Hospital and Rehabilitation Centre in Metropolitan Toronto.

(e) Existing patterns of collective bargaining in the public sector.

In this connection Mr. Hersey repeated his earlier

submission of the difference in this regard between the patterns established in other Canadian jurisdictions and Ontario's public sector.

2. Cost of Collective Bargaining

No evidence has been adduced as to the cost of collective bargaining with Board employees but it was submitted that the extra cost which would be involved in giving separate bargaining rights to nurses and other professionals would be small both with respect to overall cost and to the benefits which would accrue to these employees and the employer by a separate bargaining relationship.

3. The Public Interest

It was in the public interest that the treatment of the patient be enhanced by separate recognition, a point made by several witnesses. Dr. Caswell, referring to the treatment team, talked of their "esprit de corps", and that professionals should not be in the same unit as "housekeepers, maintenance people and aides". Dr. Kennard, in reference to the latter possibility, said "....the whole thing appals me ...." and "It is just the height of stupidity". Again, Dr. Macfarlane said if this occurred "The efficiency of the treatment of the patients might break down". Mr. Robertson claimed the ideals and responsibilities of the treatment team were so unique that if they were ever called upon as part of a unit of all employees to engage in strike action there would be conflicting and contrasting loyalties which would have an adverse effect on patient care. It was

accordingly desirable, even if the unit were small, only 20, that the interests of collective bargaining would be served by creating it. If, however, the Tribunal considered the unit too small, Mr. Hersey's alternative position was that the Nurses' Association and Allied Health Professionals should be combined into one unit.

In conclusion, he suggested that the Tribunal could adopt the approach taken by the legislature in s.6(3) of the Labour Relations Act with respect to professional engineers by giving the nurses and allied health professionals, a choice between bargaining by themselves or with all other employees.

In his submission Mr. Gordon repeated most of the arguments already made by Mr. Hersey. While admitting that many of the conditions of employment were similar for all employees, he argued that they were not substantially the same. The health professionals functioned in a different way, working in an unsupervised manner, examining patients, reaching conclusions, and making individual judgment decisions on treatment. They had the right and duty not to follow those orders of a doctor which were incompatible with their professional judgment. Therapists decided on the basis of their own assessment what treatment to administer. The exercise of this responsibility was greater than that required of other employees. Patient responsibility might supersede that of an employer. If they did not act properly they could be subject to discipline by their peers for professional misconduct.

The onus, according to counsel, was on the applicant to satisfy the Tribunal that only one large unit was appropriate in light of the desire of both the nurses and the health professionals to be separately represented by a bargaining agent and in a separate unit of their choice. There was no evidence that they would be appropriately represented by the applicant. In the alternative, both the Nurses' Association and the Allied Health Professionals had repeatedly demonstrated when given the opportunity that they had the knowledge and expertise to effectively represent their members. If their skills are to be the basis for proper compensation they must be free to bargain alone and, because opportunities were available to them elsewhere, the employer might have to meet greater competition to retain their services.

Another aspect which had to be considered was that the nurses and health professionals would be a frustrated and dissatisfied group if compelled to bargain with those with whom they had little community of interest and to be represented by a bargaining agent they did not want. This would be harmful to collective bargaining and lack of harmony would result.

Hospital employees in the private sector under the Labour Relations Act are divided into different bargaining units and, although recognizing that too much fragmentation may not be desirable, separate bargaining at those hospitals has not, in general, been detrimental to bargaining.

In conclusion, Mr. Gordon adopted the submissions made by Mr. Hersey with respect to the public interest, and also agreed

that if the Tribunal could not agree that two additional units were appropriate, that there should at least be one unit for the nurses and health professionals separate from the main unit.

The Tribunal's Conclusion

The Tribunal must now relate the evidence and argument to the criteria set out in the Ontario Housing Corporation case.

(a) Freedom of Association and Community of Interest

(1) The performance of similar work utilizing similar skills:

It should initially be recognized that both the nurses and the health professionals have unique duties and responsibilities. The members of both groups are highly trained, with many holding degrees or diplomas from post-secondary educational institutions. These employees, as members of professional organizations, must assume an additional responsibility in performing their duties, being subject to the discipline of their professional peers.

Although the Tribunal acknowledges the different duties performed by nurses and health professionals, it must be borne in mind that there will likely be found in any bargaining unit groups of employees who possess skills and perform jobs quite different from one another. Indeed, the bargaining unit proposed by the Health Professionals, containing as it does such widely disparate professional groups as remedial gymnasts, social workers, dietitians, and radiographers, illustrates this very point. Performance of similar work utilizing similar skills, therefore, cannot be considered

as the primary factor determining community of interest but only as a factor to be considered in relation to the other elements that point to a community of interest among employees.

(2) The Application of Similar or Substantially Similar Conditions of Employment

The Tribunal was impressed by the long list of employee benefits enjoyed by all employees of the respondent. On the other hand, the Tribunal realizes that the nurses and a number of the health professionals as a condition of employment must maintain membership in their respective professional associations, the membership fees of which are paid by the respondent. It is also apparent that wage rates differ according to the work performed by employees, and that nurses and health professionals will likely be among the better paid of the respondent's employees. Differences in remuneration, however, are common to any bargaining unit where different skills are required. On balance, the Tribunal considers that the similarities outweigh any differences, indicating a community of interest among all of the respondent's employees.

(3) Common Direction and Control by the Employer

It is clear that the operations of the respondent are characterized by a high degree of centralized control. Policy decisions and budgets are controlled by the Board itself. Although the Board is sub-divided into 6 divisions with numerous branches, it is apparent these components are not autonomous. Moreover, the bargaining units proposed by

the nurses and health professionals do not correspond to any of these components. We, therefore, conclude that the control and direction to which all employees are subject points to a wide community of interest.

(4) Geographical Proximity:

It is apparent that most of the Board's operation is located in Metropolitan Toronto. Although the members of the intervener-applicants are located at the hospital, there is also a substantial number of other employees at this location. We consider that this is clearly not a case where geographic remoteness dictates separate bargaining units.

(5) Existing Pattern of Collective Bargaining in the Public Sector:

Prior to formal collective bargaining in the public sector of Ontario, public servants and employees of Crown agencies had organized themselves into separate groups for the purpose of advancing their interests as employees. The pattern established was one of a single group of employees for each governmental employer. For example, in the public service, nurses and health professionals did not form separate groups, but rather advanced their interests, as did other employees, through the Civil Service Association of Ontario. The Tribunal recognizes that in the public sector of some other Canadian jurisdictions different patterns of collective bargaining have been established, especially in respect of the nurses. These different patterns have taken into account pre-existing organizational arrangements,

organizational arrangements which do not appear to have been present in Ontario to the same degree. Thus, existing patterns of collective bargaining indicate that a community of interest can be found among all employees of the respondent.

(b) Cost of Collective Bargaining

The Tribunal, although recognizing that there is often direct relationship between the number of bargaining units and the cost of collective bargaining, does not consider the cost factor to be significant in the circumstances of this case where the maximum number of bargaining units could only be three. A more important consideration, however, is the effect of any fragmentation on the overall structure of collective bargaining in the public sector, a matter to be considered in relation to the public interest factor.

(c) The Public Interest

The factor of public interest has been dealt with by us in the Ontario Housing Corporation case, where it was described in the following manner:

> This Tribunal considers that in administering the Act it should not only take into account the interest of the parties directly affected, but it should also concern itself with the interest of the public at large. Collective bargaining under this statute will have an impact on the functioning of government in Ontario. This Tribunal is concerned that the collective bargaining

structure in the public sector shall complement, and hopefully enhance, the provision of government services for the people of Ontario. Thus, there is a clear and well-defined public interest present, that must be taken into account by this Tribunal when shaping the structure of public sector bargaining in Ontario. In our opinion, a structure providing for a strong, healthy, collective bargaining relationship between the employee organization and the employer is the one most likely to complement the functioning of government in Ontario. Such a relationship means that the parties come to the bargaining table on equal terms.

In the context of public sector bargaining, however, the concept of equal terms is somewhat different than in the private sector. Bargaining strength cannot be measured in economic terms, since the Act prohibits either party from resorting to economic sanctions - the strike in the case of the employee organization and the lock-out in the case of the employer. In the absence of the threat of such economic sanctions, each party at the bargaining table must argue its case on its merits alone, an exercise calling for both intensive research and skilful advocacy. In order for employees to be well represented in this exercise, it is obvious that their organizations must have sufficient resources to match the strong voice of the employer.".

Applying these considerations to the instant case, the Tribunal considers one matter to be of paramount importance -

the avoidance of a multiplicity of bargaining units. Fragmentation of employees into numerous bargaining units creates difficulties for both the employer and the employees. For the employer, it means a continuous repetition of bargaining on similar issues with different groups, casting upon the employer the entire burden of reconciling differences among competing employee groups. For the employees, it creates a situation where numerous small organizations will be attempting to bargain on equal terms with a strong employer. This may very well lead to a situation where some of these organizations possess inadequate bargaining power, while others possess greater economic power than justified. Collective bargaining, as we perceive it, should be designed to provide economic justice to all employees.

The Tribunal's perception of the public interest is supported by the Regulations promulgated under the Act. Generally speaking the bargaining units established under Regulation 577/72 are not defined along occupational lines, all-employee units being expressly established for the Public Service, the Liquor Control and Liquor License Boards, and the Ontario Housing Corporation within Metropolitan Toronto. The sole exception is in respect to the Niagara Parks Commission, whose police force forms a separate bargaining unit, following the traditional pattern of excluding members of police forces from bargaining units of other employees in order to eliminate any possible conflict of interest.

The Tribunal, after considering and weighing all factors, concludes that the appropriate bargaining unit is one comprised of all employees of the respondent except for persons who are not employees within the meaning of clause g of subsection 1 of section 1 of The Crown Employees Collective Bargaining Act, 1972. Accordingly, the applications of the Nurses' Association and the Association of Allied Health Professionals are dismissed. A hearing date will be set to deal with the matter of a representation vote.

DATED AT Toronto this 3rd day of February, 1975.

Judge Walter Little, Chairman

T/9/73 T19/73-3

IN THE MATTER OF THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1972

AND

IN THE MATTER OF AN APPLICATION FOR REPRESENTATION RIGHTS BEFORE

THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1750, EMPLOYEES OF THE WORKMEN'S COMPENSATION BOARD

Applicant

-and-

THE CROWN IN RIGHT OF ONTARIO, (WORKMEN'S COMPENSATION BOARD)

Respondent

-and-

ASSOCIATION OF ALLIED HEALTH PROFESSIONALS: WORKMEN'S COMPENSATION BOARD OF ONTARIO

Intervener

BEFORE: Judge Walter Little, Chairman
Professor D.D. Carter, Adjudicator

DATES OF HEARING:

March 20, 1975 and May 23, 1975

APPEARANCES:

M. Hikl, W. Acton and others for the applicant.
C.G. Riggs, J.G. Betts and others for the respondent.
M. Gordon and A. Robertson for the intervener.

June 24/75
FAT-D

Decision

The Tribunal, in a decision dated February 3, 1975, determined that the appropriate bargaining unit for the employees of the respondent was "one comprised of all employees of the respondent except for persons who are not employees within the meaning of clause g of subsection 1 of section 1 of The Crown Employees Collective Bargaining Act, 1972". The parties, subsequent to this determination, were unable to agree upon the precise scope of exclusions from the bargaining unit, a number of the employment positions being disputed. The Tribunal held a hearing on March 20, 1975, at which time it decided to appoint an inquiry officer to inquire and report upon the two disputed classifications containing the largest number of employees, the classifications of claims officer and rehabilitation counsellor. At the examination conducted by the inquiry officer, the parties agreed that three employees from each classification would be examined and that on the basis of this evidence the Tribunal would determine the inclusion or exclusion of all persons in the respective classifications. The report of the inquiry officer was submitted on May 7, 1975, and the Tribunal held a hearing on May 23, 1975, to receive representations as to the conclusions that should be drawn from this report.

The Crown Employees Collective Bargaining Act (the Act) makes it clear that only "employees" are to be included in any bargaining unit determined to be appropriate for collective bargaining purposes under the Act. The term

"employee" is defined in section 1(l)(g) of the Act as not including, inter alia, "a person employed in a managerial or confidential capacity". This term is given a very specific meaning by the first seven sub-paragraphs of section 1(l)(m). The final sub-paragraph, however, provides a wide discretion to the Tribunal in determining whether persons should be excluded from collective bargaining under the Act. The effect of these provisions, therefore, is two-fold. First, they expressly set out certain job functions, the exercise of which is incompatible with collective bargaining and, second, they confer upon the Tribunal a residuary jurisdiction to determine any further instances of incompatability. The Tribunal, although recognizing the need for a management presence in collective bargaining relationships, considers that these provisions should not be interpreted so as to exclude persons unnecessarily from collective bargaining under the Act. In other words, these provisions, and especially sub-paragraph (viii), should only be applied where it is clearly evident that the job functions being performed are incompatible with the exercise of collective bargaining rights.

The Tribunal recognizes that, regardless of where it is drawn, the line between employees and managerial exclusions will always appear to be somewhat artificial, since there may not be great differences in the job responsibilities of employees on opposite sides of the line. The fact is, though, that in any employment situation there is a

spectrum of job responsibilities and sharp distinctions will be difficult to perceive. The Tribunal, in determining whether the job responsibilities of a person excludes that person from collective bargaining must necessarily deal with matters of degree, matters that make the task of drawing the line a difficult one. This particular case, involving the two classifications of claims officer and rehabilitation counsello demonstrates the difficulty of this type of task.

The status of the claims officers depends upon whether the functions performed by these persons fall within sub-paragraph (v). That provision excludes from the Act any person who "adjudicates or determines claims for compensation which are made pursuant to the provisions of any statute". The question is whether the evidence clearly demonstrates that such functions are performed by the claims officer. The report of the inquiry officer contains evidence in respect to three of these claims officers, each of whom performed slightly different job responsibilities. In view of the agreement of the parties, the Tribunal regards these three persons as being a representative sample of the entire classification. The evidence of these three persons, therefore, must be viewed as a whole and undue significance should not be attached to the particular job responsibilities performed by any one of these three persons.

The Tribunal considers that the claims officers do not perform an adjudicative function. These persons are engaged in the initial processing of claims from injured work-

men. At this stage, the exercise is of an administrative nature, since no use is made of judicial procedures and judicial methods of proof. Because of the absence of judicial trappings, the initial processing of claims is clearly not an exercise in adjudication. This conclusion, however, does not end the matter.

The next question is whether the claims officers determine claims for compensation. The answer to this question depends upon the amount of independent discretion possessed by the claims officers. If it can be said that these persons have independent authority to dispose of claims submitted by injured workmen, then the question must be answered in the affirmative. The evidence indicates that two of the examined claims officers were responsible for investigating claims at the initial stage. Once their investigation was completed, these persons could then authorize payment of the claims. Many of these authorizations were made without any consultation with the supervisor, although consultation did occur in the more difficult cases, and the denial of a claim required the co-signature of a supervisor. In addition, the performance of these persons was subject to review by the supervisor. One of the examined claims officers appeared to exercise less independent discretion than the other two, having responsibility only for determining whether a claimant continued to be eligible once the claim had been initially determined. Furthermore, the evidence indicated that all three of these persons relied on the

advice of the board's medical officers when they were dealing with claims. Finally, the evidence indicated that the initial processing of claims could be appealed by interested parties by recourse to an appeal procedure set up within the board.

On the basis of this evidence, the Tribunal concludes that the claims officers do exercise an independent discretion when they authorize the payment of substantial amounts of the respondent's funds to injured workmen. Although the claims officers are guided by certain criteria, provided by the Act or contained in the internal operating manual, the interpretation and application of these criteria involves, at least in part, the exercise of the individual discretion of the claims officer. The claims officers may consult with others prior to reaching a decision but they still have the responsibility for initially disposing of the claims. These persons are not just making a contribution to a group decision but are, in fact, decision-makers. The requirement of a co-signature of a supervisor where claims were denied, although obviously reducing this discretion, does not eliminate it. The fact is that claims officers could decide to disperse the respondent's funds without the check of a co-signature. The evidence indicated that in general the claims officers are not subject to close supervision. Once experience in processing claims had been acquired, the claims officers are not subject to the close supervision of a superior. The existence of the appeal procedure, moreover, does not negative the

existence of independent discretion. It is clear that, in many cases, the claims officer can authorize the payment of a claim and no appeal will occur. The appeal procedure is not a constant and continuing check that would eliminate the independent discretion of the claims officer. Accordingly, the Tribunal concludes that persons employed as claims officers are not employees within the meaning of the Act.

The primary argument put forward for the exclusion of rehabilitation counsellors was that these persons fell within sub-paragraph (viii) and should not be included in a bargaining unit because of their duties and responsibilities to the employer. In addition, it was argued that these persons should be excluded because they fell within the wording of sub-paragraph (v) as determining claims, or at least under sub-paragraph (vi) as being employed in a position confidential to persons determining claims. The primary thrust of the argument to exclude these persons focused on the responsible and confidential nature of the job functions being performed. The Tribunal considers, however, that responsibility and confidentiality in the abstract are not sufficiently valid reasons for excluding persons from collective bargaining under the Act. The fact is that many government employees assume important responsibilities and, while performing these responsibilities, often have access to confidential information. If the Tribunal were to exclude persons from the Act on these grounds alone, a very large number of Crown employees would

be deprived of collective bargaining rights. The wording of the Act does not indicate that this was the intention of the Legislature. Section 1(l)(m) specifies a number of particular situations where persons are excluded from the Act because of an obvious incompatability between performance of their duties and the exercise of collective bargaining rights, strongly suggesting that the Tribunal should not invoke the residuary jurisdiction unless the same type of incompatability is demonstrated. In other words, the Act should be interpreted as not excluding all persons whose duties are of a responsible or confidential nature, but only where there is some obvious incompatability between collective bargaining and the performance of these duties.

The evidence indicates that the rehabilitation counsellors were employed to assist injured workmen to return to useful employment. This job required that rehabilitation counsellors deal with the injured workmen, employers, employment agencies, trade unions, and other branches in the respondent's organization. One aspect of the job was to arrange for vocational training for the injured workmen. In making these arrangements the rehabilitation counsellor could authorize on his own initiative the expenditure of up to $500.00 of the funds of the board, any larger sums requiring the authorization of a supervisor. It would appear that virtually all the vocational training arrangements required the expenditure of more than $500.00 by the board. Recommendations

The fact is that the rehabilitation counsellors have virtually no independent discretion to disperse the funds of the board. Recommendations concerning vocational training payments are subject to the close scrutiny of supervisors, and recommendations concerning the commutation of pensions are subject to even closer control. Decisions to reduce the benefits of injured workmen under section 41, moreover, are made by the claims adjudication branch, not by rehabilitation counsellors.

Can it be said, however, that the rehabilitation counsellors are employed in a position confidential to persons determining claims for compensation? We think not. First, as we indicated above, a distinction is to be made between the board's compensatory and rehabilitative functions. It is quite apparent that the rehabilitation counsellors are involved in the latter function but only incidentally, if at all, in the former function. Payments for vocational retraining are not payments to compensate a workman for a loss incurred but, rather, for the purpose of improving the future employment prospects of the injured workman. The commutation of pension, although involving the disbursement of money, merely involves a change in the form of compensation already determined, not a determination of compensation.

The only point at which the rehabilitation counsellor becomes involved in the actual claims process is in making reports on the progress of injured workmen in vocational rehabilitation. The exercise of this reporting function,

respecting the commutation of pension was a further aspect of the rehabilitation counsellor's job. These recommendations, however, were subject to the scrutiny of both the rehabilitation officer's supervisor and the chief rehabilitation officer. A further aspect of the job involving expenditure of the board's funds was the rehabilitation counsellor's responsibility to report to the claims adjudication branch on whether injured workmen were cooperating with the rehabilitation programme. If the attitude of the injured workmen was uncooperative, the claims adjudication branch, by virtue of section 41 of the Workmen's Compensation Act, was authorized to reduce the benefits payable to the injured workman.

The Tribunal will deal first with the argument that the rehabilitation counsellors are determining claims made pursuant to the Workmen's Compensation Act. In our view, this contention is totally unsupported by the evidence. It is quite apparent that the prime function of the rehabilitation counsellor is not to determine whether the injured workman is entitled to benefits but rather to assist the workman in returning to useful employment. Although the rehabilitation counsellor may recommend that certain benefits be paid to the injured workman, these benefits are not compensatory in nature but rather relate to the rehabilitation of the injured workman. Even if it can be said that the rehabilitation officers are dealing with claims of injured workmen, it cannot be said that these persons are actually determining claims.

however, does not make the rehabilitation counsellor a person employed in a position confidential to a person determining claims. In order for persons to be excluded on the basis of a confidential relationship, it must be shown this relationship forms a significant component of the job being performed. Otherwise, the exclusionary net will be opened too widely. In this case, the evidence indicates that the reporting function performed by the rehabilitation counsellor is only a very small part of the job, the primary function being to assist injured workmen to return to useful employment. Accordingly, the Tribunal does not consider that the rehabilitation counsellor is employed in a position confidential to the claims officer.

The primary argument for excluding the rehabilitation counsellors was based on sub-paragraph (viii). The argument was that the rehabilitation counsellors were in a responsible position, dealing with injured workmen, employers and trade unions. In addition, it was argued that the rehabilitation counsellors were in possession of confidential information concerning injured workmen. The Tribunal recognizes that the rehabilitation counsellors have an important job to perform and that they do have access to confidential files, but it is difficult to see any incompatability between the performance of their job and participation in collective bargaining. Although the

rehabilitation counsellors appear to have a wide discretion in performing their job, it cannot be said that they are exercising a managerial function. It is quite evident that these persons have no managerial authority over other employees and that they have only a very restricted fiscal authority. It is even clearer that these persons are not employed in any kind of confidential capacity in matters relating to employee relations. Given this evidence, the Tribunal can see no reason why it should invoke its discretion under sub-paragraph (viii) to exclude rehabilitation counsellors from bargaining collectively under the Act. Accordingly, the Tribunal concludes that rehabilitation counsellors are employees under the Act and should be included in the bargaining unit.

DATED at Toronto, this 20th day of June, 1975.

Judge Walter Little
Chairman

T/1/74

In the Matter of the Crown Employees Collective Bargaining Act, 1972

And

An Application Before the Ontario Public Service Labour Relations Tribunal

Between:

THE ONTARIO COUNCIL OF REGENTS FOR
COLLEGES OF APPLIED ARTS AND TECHNOLOGY

Applicant

- and -

THE CIVIL SERVICE ASSOCIATION OF
ONTARIO, INC.

Respondent

Before: Judge Walter Little, Chairman
Professor D.D. Carter, Adjudicator
Professor R.S. Mackay, Adjudicator

Date of Hearing: February 21, 1974

Appearances: F.G. Hamilton, Q.C., for the Applicant
S.T. Goudge, and others, for the Respondent

DECISION

The Applicant and Respondent have been engaged in negotiations for the renewal of a collective agreement, dated September 6, 1972, and expiring August 31, 1973. By letter dated July 25, 1973, the Respondent, noting that these negotiations had failed to bring about an agreement, requested the Tribunal to appoint a mediator to assist the parties pursuant to section 8(1) of the Crown Employees Collective Bargaining Act, 1972. The Tribunal appointed Professor Gordon Simmons as mediator and the latter conducted meetings with the parties during September and October, 1973. Professor Simmons was obliged to report, however, that he was unable to effect a collective agreement and the Tribunal, by letter dated November 29, 1973, directed the parties to proceed to arbitration pursuant to section 10(2) of the Act. An Arbitration Board has in fact been established and has already held preliminary meetings.

With respect to these arbitration proceedings the applicant submits that several proposals of the respondent Association are not proper matters for bargaining under the Act (with particular reference to sections 6 and 17 thereof) and hence are not subject to arbitration. Accordingly, the applicant requests a decision and direction from this Tribunal that the proposals in question are not arbitrable. In the view of Mr. Hamilton, the Tribunal is empowered to make such a decision, that is, determine what issues are or are not arbitrable, by virtue of section 37 of the Act which provides that:

> "The Tribunal has exclusive jurisdiction to exercise the powers conferred upon it by this Act and to determine all questions of fact or law that arise in any matter before it ..."

It is, of course, implicit in this argument that the arbitration process is a "matter" before the Tribunal.

On the other hand, Mr. Goudge, on behalf of the respondent, maintained that only the Arbitration Board itself, and not the Tribunal, had jurisdiction to determine what issues are or are not subject to arbitration.

The main arguments advanced by Mr. Hamilton in favour of jurisdiction in the Tribunal may be briefly summarized as follows. In the first place, he referred to several sections in the Act which emphasize the continuing involvement of the Tribunal in the overall settlement process, including arbitration, and hence, he argued, the arbitration process is properly a "matter" before the Tribunal within the meaning of section 37 of the Act.

Furthermore, in Mr. Hamilton's view, the existence of bargainable or arbitrable issues is a pre-condition to the appointment of a board of arbitration by the Tribunal and thus it is essential that the Tribunal has jurisdiction to make such a determination.

In addition, Mr. Hamilton found support for his position from a comparison of certain sections of the Act dealing with the respective powers of arbitration boards and of this Tribunal. Such a comparison, in his opinion, clearly demonstrates that the Tribunal has much greater powers than a board of arbitration and inherently and properly should be the forum to dispose of the crucial decision whether or not a matter falls within the scope of collective bargaining and hence whether or not it is subject to arbitration. For example, by way of contrast, Mr. Hamilton compared the broad powers conferred on the Tribunal by section 37 of the Act with the more limited (in his view) provisions of section 11(2) relating to boards of arbitration. Again, in similar vein, he contrasted section 18(1) of the Act, which provides that:

> "Every collective agreement shall be deemed to provide that in the event the parties are unable to effect a settlement of any differences between them arising from the interpretation, application, administration or alleged contravention of the agreement, including any question as to whether a matter is arbitrable, ..."

with section 11(1) of the Act which simply recites that:

> "The Board shall examine into and decide on matters that are in dispute within the scope of collective bargaining under this Act."

Comparing these two sections, Mr. Hamilton argued that if the statute intended to confer jurisdiction upon an arbitration board to determine the issue of arbitrability it would have said so specifically and included in section 11(1) a phrase similar to that contained in section 18(1). In the absence of such a phrase in section 11(1), it is Mr. Hamilton's contention that it is the Tribunal, and not the Board, which winnows out matters going to arbitration and that this is a power and a function which is consistent and in keeping with its overall supervision, responsibility and involvement with respect to the arbitration process.

Hopefully the foregoing, perhaps too brief, outline of Mr. Hamilton's arguments does some measure of justice to the extremely able presentation that he made.

For the respondent, Mr. Goudge relied mainly upon two arguments. In the first place he notes that nowhere does the Crown Employees Collective Bargaining Act, 1972, specifically confer the power in question upon the Tribunal. In the second place, and as a matter of policy, such a power should

not be inferred or assumed because it would be unfortunate if the Tribunal were to engage or intervene in any part of the arbitration process itself and if it were to exercise such a power it would be manifestly doing just that. In other words, it is the Board, not the Tribunal, that is the proper forum to determine the issue of arbitrability, the fundamental and threshold question upon which the whole arbitration process depends.

Quite apart from anything else, Mr. Goudge continued, if the Tribunal were to assume jurisdiction to decide what constitutes bargainable issues it must, almost inevitably, find itself involved with the merits of the underlying proposals. In the instant case a particularly difficult problem which would face the Tribunal, if it assumed jurisdiction, would be to define the interrelationship between sections 6 and 17 of the Act and the distinction between bargainable terms of employment on the one hand and management functions on the other. In Mr. Goudge's submission these and like considerations are uniquely and only appropriate for an arbitration board to determine.

The policy arguments raised by Mr. Goudge appeal to the Tribunal as being of particular significance. Based upon such policy considerations, buttressed by reference to section 11(1) of the Act, it is the award of this Tribunal that the request of the applicant be refused. It follows that it is the opinion of the Tribunal that the presently constituted Board of Arbitration has jurisdiction to determine whether or not the various proposals submitted by the Association for inclusion in a collective agreement are properly the subject matter of arbitration.

Quite apart from policy considerations, section 11(1) by necessary implication confers the jurisdiction in question upon the Board and hence excepts it as a "matter" within the power of the Tribunal under section 37 of the Act. As a matter of ordinary statutory interpretation the qualification "within the scope of collective bargaining under this Act" would not be required in section 11(1), and the sentence would properly end with the word "dispute", if jurisdiction were vested in the Tribunal only. On the contrary, it follows that jurisdiction is vested in the Arbitration Board by virtue of section 11(1) and such an interpretation is not affected by any implications (such as were drawn by Mr. Hamilton) arising from a comparison between the language of section 18 and that found in section 11. It will be recalled that section 18 makes specific reference to "any question as to whether a matter is arbitrable" whereas section 11 contains no such reference in defining the jurisdiction of boards of arbitration. However section 18, which confers jurisdiction on the Public Service Grievance Board, is a limiting provision which only applies to differences arising from the interpretation or application, etc., of collective agreements. It is similar in application to grievances in the private sector under section 37 of the Labour Relations Act. It accordingly has no bearing on the interpretation of section 11(1) of the statute.

From the standpoint of policy the assumption of jurisdiction by the Board also accords with the paramount consideration that parties should be free, in an arbitration process, to bargain as much as possible themselves, and to thresh out as many matters as possible between themselves, without

the intervention of an outside body such as the Tribunal. In section 9 of the Act it is explicitly stated that "all matters in dispute ... shall be decided by arbitration" and it is crucial that the process of arbitration be unfettered and free from intervention which can only have the effect of discouraging the parties from working out matters themselves.

In summary the Tribunal refuses the request of the Applicant and rules that the Arbitration Board has jurisdiction to determine what matters are arbitrable before it. The reasons are twofold, that is, no such jurisdiction is specifically conferred upon the Tribunal but it is so conferred upon the Board, and, secondly, as a matter of policy, the Tribunal should not interfere or intervene in the course of the bargaining process.

Dated at Toronto this day of March, 1974.

Chairman

IN THE MATTER OF THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1972

AND

AN APPLICATION BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

GILMOUR ROSS ANDERSON
Applicant

and

THE CIVIL SERVICE ASSOCIATION OF ONTARIO (Inc.)
Respondent Employee Organization

and

THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF TRANSPORTATION AND COMMUNICATION)
Respondent Employer

BEFORE: Judge Walter Little, Chairman
Professor D. D. Carter, Adjudicator
Professor R. S. Mackay, Adjudicator

DATE OF HEARING:

July 17, 1974

APPEARANCES FOR THE APPLICANT:

J. B. McKenna, Counsel

APPEARANCES FOR THE RESPONDENT EMPLOYEE ORGANIZATION:

S. T. Goudge, Counsel
K. Smook, Representative

APPEARANCES FOR RESPONDENT EMPLOYER:

W. J. Gorchinsky, Senior Staff Relations Officer

DECISION

This is an application under section 15(2) of the Crown Employees Collective Bargaining Act, 1972 (the Act) seeking an exemption from the provisions of a collective agreement requiring the applicant to pay dues to the respondent employee organization. The collective agreement between the Crown in Right of Ontario (as represented by the Management Board of Cabinet) and the Civil Service Association of Ontario (Inc.) provides, as the result of a recent amendment, that the sum of two dollars per week shall be deducted as membership dues from the pay of certain employees, among whom is included the applicant. The applicant seeks exemption from this provision of the collective agreement on the ground that "It is my religious belief and conviction that I am unable to support either directly or indirectly any policies pertaining to strike action, or for the establishment of a strike fund and particularly the vowed militant posture now proclaimed by the Civil Service Association of Ontario."

At the hearing, the evidence revealed that the grievor became a public servant in March of 1966. Later that year, he voluntarily joined the Civil Service Association of Ontario (Inc.), which at that time participated in a form of collective bargaining with the Government of Ontario. According to the applicant, although he opposed strikes at that time, he was able to support the Civil Service Association because its collective bargaining activities did not include strike action, being confined to negotiation and participation in a process of interest dispute arbitration. The applicant now objects to the respondent employee organization because of its recent campaign to obtain the right to

strike by seeking changes in the Act.

The applicant testified that he had been a member of the United Church of Canada since its founding in 1925. He stated that his religion was an inseparable part of his day to day living, and that he attempted to find many of the answers to life in his own conscience. According to the applicant, his conscience dictated that strikes were morally wrong, since they were disruptive to society and disruptive of the economy. Moreover, he testified that he believed that any attempt to obtain the right to strike would also be wrong. Finally, the applicant testified that he considered the employee organization's current campaign directed at obtaining the right to strike as being seditious and subversive, and that any continuation of financial support by him would be wrongful, amounting to a violation of the oath of allegiance taken by him upon joining the public service.

The applicant argued that his objection to providing financial support to the employee organization was based on a religious conviction or belief, since he sincerely believed that his objections rested upon a religious basis. In reply, the respondent employee organization argued that, although a religious belief could be subjective in the sense that it might not be held by persons other than the individual applicant, the Tribunal must still determine the existence of the religious belief by testing it against certain objective criteria, rather than by merely relying upon an applicant's statement concerning his belief. A number of objective criteria were suggested: (1) the moral dimensions of the belief; (2) the relation of the belief to a divine source; (3) the extent to which the belief is applied; and (4) the directness of the causal link between the objection and the

religious belief. In addition, the respondent argued that the assessment of the credibility of the applicant must be made carefully, since in this type of case the applicant's testimony is usually the only source of evidence. In the instant case, the respondent placed special emphasis on the relationship between the applicant's religious belief and his objection to the employee organization. According to the respondent, the applicant's objection to the employee organization was not primarily based upon his religious beliefs but, rather, on more pragmatic considerations such as the impact of the strike upon society and upon the economy, and the impact of the current publicity campaign upon relations between the government and its employees. In addition, the respondent argued that, since the applicant's beliefs did not conflict with all of the activities carried on by the employee organization, the alleged incompatibility between the applicant's religious beliefs and the total activities of the employee organization was not sufficiently pronounced to justify an exemption under Section 15(2). No argument was submitted by the respondent employer.

The fundamental conflict between the rights of an employee organization and the rights of an individual underlies this application. It must be recognized that collective bargaining by its very nature requires that there be a derogation of individual rights. The need for a unified employee bargaining front presented by the employee organization renders inappropriate individual arrangements between the employer and its employees, even though some employees may not wish to be members of the organization. Conversely, the organization must bargain for all employees, whether members or not. In addition to bargaining on behalf of the employees, the organization may bargain on it's

own behalf by negotiating some form of security for itself. Such security provisions, although frequently impinging upon individual rights, are regarded as being necessary to ensure the continued vitality of the organization. The Act, in establishing a collective bargaining structure for the public sector of Ontario, recognizes these basic principles. Section 4 of the Act confers representation rights upon qualified employee organizations that can demonstrate majority support. Once an employee organization is granted representation rights, it has the authority to bargain with the employer on the bargainable issues set out in Section 6. This is an authority to bargain on behalf of all employees in the bargaining unit, whether members of the employee organization or not. In addition, Section 15 (1) of the Act permits the employee organization to bargain for its own financial security. The primary thrust of the legislation is clearly directed toward conferring legal rights upon the organization in order to encourage workable bargaining relationships.

The Act, however, also confers upon individuals certain rights relating to their relationship with the organization. The organization, although possessing authority to bargain, is under the duty, imposed by Section 28, to fairly represent all employees in the bargaining unit. Section 27(3) protects the employee from certain types of pressure that might be asserted by an employee organization. Collective agreement provisions requiring membership in an employee organization as a condition of employment are prohibited under Section 15. More important to this case, Section 15 also recognizes that individual religious beliefs prevail over the organization's claim to financial security. Section 15(2) provides that:

> "Where the Tribunal is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Tribunal shall order that the provisions of the collective agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such an agreement then to such charitable organization registered as such under Part 1 of the Income Tax Act (Canada) as may be designated by the Tribunal."

This provision recognizes that individual employees should not be compelled to financially support organizations whose purposes or activities are antithetical to their own religious beliefs. Although providing an exemption from the payment of dues, Section 15(2) does not give the individual any financial incentive to claim the exemption. If the exemption is granted, the money that would have been paid to the employee organization must then be directed to some charitable organization. Although the employee organization loses the benefit of the individual's dues payments, the individual derives no personal saving from obtaining an exemption. Moreover, the granting of an exemption does not derogate from the organization's role as bargaining agent of the employees in the bargaining unit. The organization still has the right to bargain on behalf of the exempted employee and, because of Section 28, also has a duty to bargain for the exempted employee.

The actual application of Section 15(2) poses some difficulty. Although it is clear that the section must be restricted to religious objections, the fact is that religion

assumes many forms, often depending on the perceptions of the individual. If the Tribunal were to attempt to formulate its own concepts of acceptable religious beliefs, it might be proclaiming an orthodoxy which would not permit sufficient scope for individual perceptions. On the other hand, if the Tribunal were simply to take an applicant's objection at face value, the door would be open to any dissident who could rationalize his objection on a religious basis. Consequently, there is a duty upon the Tribunal to objectively evaluate each application. In order that this objective evaluation takes into account individual religious views, the Tribunal considers that the proper approach is to carefully scrutinize the sincerity of each applicant. The applicant, whose testimony is the only real source of evidence in these cases, is under a burden to establish that his objection to paying dues is based upon sincerely held religious convictions or beliefs. In assessing the sincerity of the applicant, the Tribunal should consider such matters as (1) the demeanour of the witness while testifying; (2) the nature of the applicant's beliefs--their relationship to a divine being and the moral dimensions of such beliefs; (3) the previous religious experience of the applicant; (4) the relationship between that religious experience and the belief currently held by the applicant; (5) the directness of the connection between the religious belief and the objection to paying dues to an employee organization; and (6) the extent to which the religious belief is applied. It is not intended that these considerations be construed as rules restricting the scope of Section 15(2), but only as factors that go to determining the sincerity of the

applicant's avowed religious beliefs. The issue in cases such as this is essentially one of fact, and one not amenable to resolution by the application of rigid rules.

In the instant application, the Tribunal must determine whether the applicant does in fact hold a sincere religious objection to paying dues to the respondent employee organization. After considering the relevant factors, the Tribunal concludes that the applicant's objection to paying dues to the employee organization does derive from his religious beliefs. The applicant is a person who has practised his religion for a number of years. The church to which this applicant belongs encourages the making of individual moral judgements relating to the ordinary affairs of life. The applicant's individual judgement on the present posture of the respondent employee organization in seeking the right to strike appears consistent with his previous religious experience. The testimony of the applicant, given in a forthright manner, withstood the test of cross-examination. The Tribunal is convinced that this is a case where religious belief has led to the objection and not a case where the religious belief is merely a rationalization of the objection.

It is the order of the Tribunal that the provisions of the collective agreement between the respondent employee organization and the respondent employer, requiring the payment of membership dues to the respondent employee organization, shall not apply to the applicant, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the applicant employee and

the respondent employee organization. In the event that no agreement is reached upon this matter, the Tribunal reserves jurisdiction to designate the charitable organization.

DATED at Toronto, this 8th day of August, 1974.

Judge Walter Little,
Chairman.

T/3/74-1

IN THE MATTER OF THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1972

AND

IN THE MATTER OF AN APPLICATION FOR REPRESENTATION RIGHTS BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1750, EMPLOYEES OF THE WORKMEN'S COMPENSATION BOARD

Applicant

-and-

THE CROWN IN RIGHT OF ONTARIO, (WORKMEN'S COMPENSATION BOARD)

Respondent

-and-

ASSOCIATION OF ALLIED HEALTH PROFESSIONALS: WORKMEN'S COMPENSATION BOARD OF ONTARIO

Intervener

BEFORE: Judge Walter Little, Chairman
Professor D.D. Carter, Adjudicator

DATE OF HEARING: August 14, 1975

APPEARANCES:

M. Hikl and others for the applicant.
C.G. Riggs, J.G. Betts and others for the respondent.
D. Livingston and others for the intervener.

Decision

The Tribunal determines, taking into account the agreement of the parties, that a unit consisting of all employees of the Workmen's Compensation Board in Ontario save and except supervisors, persons above the rank of supervisor and persons excluded by virtue of the provisions of The Crown Employees Collective Bargaining Act, 1972, is the unit of employees that is appropriate for collective bargaining purposes under the Act.

The Tribunal is satisfied on the basis of all the evidence before it that not less than 35% of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on the terminal date fixed for this application and the date which the Tribunal determined under section 39(1)(f) of The Crown Employees Collective Bargaining Act, 1972, to be the time for the purpose of ascertaining membership evidence under section 4(1) of the Act.

The Tribunal directs that a representation vote in the bargaining unit found to be appropriate be held on September 10th, 1975. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

DATED at Toronto, this 14th day of August, 1975.

Judge Walter Little
Chairman

T13/74-2

T3/74

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1972

BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 1750
EMPLOYEES OF THE WORKMEN'S COMPENSATION BOARD

Applicant

-and-

THE CROWN IN RIGHT OF ONTARIO
(WORKMEN'S COMPENSATION BOARD)

Respondent

-and-

ASSOCIATION OF ALLIED HEALTH PROFESSIONALS:
WORKMEN'S COMPENSATION BOARD OF ONTARIO

Intervener

GRANT OF REPRESENTATION RIGHTS

Upon application of the applicant, and in accordance with, and subject to, the provisions of The Crown Employees Collective Bargaining Act, 1972, the Tribunal grants representation rights to Canadian Union of Public Employees Local 1750 Employees of the Workmen's Compensation Board as the bargaining agent of all employees of the Workmen's Compensation Board, save and except supervisors and persons above the rank of supervisors, and persons excluded by virtue of the provisions of The Crown Employees Collective Bargaining Act, 1972.

DATED at Toronto, this 30th day of October, 1975.

Judge Walter Little, Chairman.

IN THE MATTER OF THE MINISTRY OF COLLEGES AND UNIVERSITIES ACT, 1971

AND

AN APPLICATION BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

THE CIVIL SERVICE ASSOCIATION
OF ONTARIO (INC.)

Applicant

- and -

NORMAN A. SISCO

Respondent

BEFORE: Judge Walter Little, Chairman
Professor D.D. Carter, Adjudicator

DATES OF HEARING: September 26 and October 23, 1974.

APPEARANCES FOR THE APPLICANT:

Ian G. Scott, Q.C. - Counsel
Chris G. Paliare - "
Judith Gelber - Staff Representative
Ronald Martin - Faculty Member

APPEARANCES FOR THE RESPONDENT:

F.G. Hamilton - Counsel
Norman A. Sisco - Chairman, Council of Regents
John Lynch - Collective Bargaining Officer
George Campbell - Senior Staff Relations Officer

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PROCEDURAL RULING

At the commencement of the hearing, the applicant requested the Tribunal to rule upon the validity of the defence raised in part 2(iv) of the respondent's reply prior to receiving any evidence and prior to hearing argument on the other defences. Part 2(iv) was as follows:

> "(iv) In any event, the applicant's contravention and defiance of the legislation which it now seeks to rely on, disentitles and precludes it from seeking the relief claimed. Among other acts committed by the applicant that breach and defy the legislation are the following:
>
> (a) The applicant's refusal to attend and participate in arbitration proceedings and its failure to make every reasonable effort to make a collective agreement, which violates Sections 7(2), 9 and 11 of the Crown Employees Collective Bargaining Act, 1972;
>
> (b) The applicant, its officers and representatives have violated Section 29 of the above Act by counselling, procuring or supporting illegal work stoppages and engaging in acts contrary to Section 33 of the Crown Employees Collective Bargaining Act, 1972;
>
> (c) The applicant, its officers and representatives endeavoured to bargain with the Committee of Presidents rather than the bargaining representatives appointed by the Council of Regents and thereby violated the applicable legislation;
>
> (d) The applicant, its officers and representatives have misrepresented the Council of Regents offers on salary and other improvements presented in negotiations.
>
> The respondent respectfully requests the Tribunal declare the above mentioned actions of the applicant to be in violation and breach of the legislation and to find that by such pattern of illegal conduct, the applicant is disentitled to any relief."

The Tribunal ruled that the applicant had not established valid reasons for adopting such an extraordinary procedure, and one recognized as such by counsel for the applicant. The Tribunal stated that, as a quasi-judicial body, it should follow normal adversarial procedures similar to those followed by the Courts in civil actions. In such cases, the Courts determine the validity of the positions of the respective parties once each party has completed its case. Even though the Tribunal had certain reservations concerning its jurisdiction to grant the declaration requested in the respondent's reply, it considered that it would be premature to rule upon this matter at the commencement of the hearing. The Tribunal, therefore, ruled that it would deal with the validity of the respondent's defence once it had heard the evidence and all arguments relating to the application.

Counsel for the applicant indicated that, because of the limited scope of his retainer, he was unable to take any further part in the proceedings. Judith Gelber, a staff representative of the applicant, then indicated that the applicant did not intend to proceed with the matter at that time or in the future.

Accordingly, the application is dismissed as a withdrawn application.

Dated at Toronto this 24th day of October, 1974.

.....

Judge Walter Little
Chairman

IN THE MATTER OF THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1972

AND

AN APPLICATION BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

MARGARET JEAN TAGGART — Applicant

and

THE CIVIL SERVICE ASSOCIATION OF ONTARIO (INC.) — Respondent Employee Organization

and

THE CROWN IN RIGHT OF ONTARIO — Respondent Employer

BEFORE: Judge Walter Little, Chairman
Professor D.D. Carter, Adjudicator

DATES OF HEARING:

January 24, 1975, July 22, 1975 and October 27, 1975

APPEARANCES FOR THE APPLICANT:

M. J. Taggart, in person
Gerald Vandezande (on October 27th only)

APPEARANCES FOR THE RESPONDENT EMPLOYEE ORGANIZATION:

S. T. Goudge, Counsel
J. A. Millard, Legislative Officer

APPEARANCES FOR RESPONDENT EMPLOYER:

Miss Dianne Nagel

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DECISION

This is an application under section 15(2) of The Crown Employees Collective Bargaining Act, 1972 seeking an exemption from the provisions of a collective agreement requiring the applicant to contribute financially to the respondent employee organization.

The Tribunal, after considering the evidence and the arguments submitted by the parties, is satisfied that the applicant's objections to making such a contribution are based upon a sincerely held religious belief. Full reasons for this decision will be provided by the Tribunal, if requested by any of the parties.

At the first hearing of this matter, held on January 23, 1975, the question of the effective date of the exemption was raised. The Tribunal did not deal with the matter at that time, and adjourned this application and the other pending applications on the following terms:

1) that new hearing dates not be set until the Divisional Court rules upon the Tribunal's decision concerning G. R. Anderson;
2) that by the consent of the employee organization any exemption made in respect of any of these applications will be retroactive to a date to be established by adding the number of days during which its decision may be reserved to January 23, 1975.

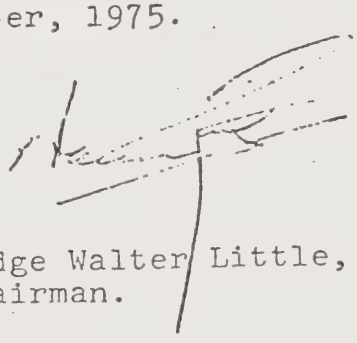
In setting out these terms, the Tribunal expressly recognized that they were established without prejudice to the right of any party to make submissions concerning the Tribunal's jurisdiction to make a retroactive order for exemption from dues, except as to the terms of the adjournment.

After considering the submissions made on this matter, the Tribunal has concluded that the exemption does not become effective until the Tribunal has satisfied itself that grounds for it exist.

In this case, however, under the terms of adjournment, the exemption will be effective from January 23, 1975.

The Tribunal designates "Underground Evangelism" as the charitable organization to which amounts equivalent to union dues shall be paid.

DATED at Toronto, this 27th day of October, 1975.



Judge Walter Little,
Chairman.

IN THE MATTER OF THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1972

AND

AN APPLICATION BEFORE THE
ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

HEDDY M. RUPERT

APPLICANT

and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

RESPONDENT
EMPLOYEE
ORGANIZATION

and

ONTARIO GOVERNMENT

RESPONDENT EMPLOYER

BEFORE: Judge Walter Little, Chairman
Professor D.D. Carter, Adjudicator

DATE OF HEARING:

January 16th, 1976

APPEARANCES:

Mrs. Vivienne Hansford for the Respondent Employee Organization.
Neither the applicant, nor anyone on her behalf, appeared.
The Respondent Employer was not represented.

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DECISION

1. The style of cause in this matter has been amended by substituting "Ontario Public Service Employees Union" for "The Civil Service Association of Ontario (Inc.)".

2. The applicant, although being notified of the time and place of hearing, failed to attend.

3. The application is therefore dismissed.

DATED at Toronto, this 16th day of January, 1976.

Judge Walter Little,
Chairman

T2/75

IN THE MATTER OF THE CROWN EMPLOYEES
COLLECTIVE BARGAINING ACT, 1972

AND

AN APPLICATION BEFORE THE ONTARIO PUBLIC
SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Applicant

and

THE CROWN IN RIGHT OF ONTARIO
(MINISTRY OF GOVERNMENT SERVICES)

Respondent

BEFORE: Judge Walter Little, Chairman
Professor D.D. Carter, Adjudicator

DATE OF HEARING:

January 30, 1976

APPEARANCES:

S.M. Grant for the applicant
C.G. Riggs and others for the respondent

DECISION

The name "The Civil Association of Ontario (Inc.)" appearing in the style of cause of the application as the name of the applicant has been amended to read "Ontario Public Service Employees Union".

This is an application for a determination by the Tribunal as to whether certain persons are employees within the meaning of The Crown Employees Collective Bargaining Act,

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1972 (the Act). The parties agreed that this Tribunal had jurisdiction to deal with the application.

At issue in this case is the status of eighteen persons employed at the legislative building at Queen's Park. This group is composed of four stewards for the members lounge, eight tour guides, one cook, two stewards in the press lounge, and three persons that had come from Government Services, Finance Branch. Up to December 20, 1974, these eighteen persons were public servants and, therefore, represented for the purpose of collective bargaining under the Act by the applicant employee organization.

On December 20, 1974, however, certain amendments to The Legislative Assembly Act, R.S.O. 1970, c.240, came into force. One of these amendments, s.91 of The Legislative Assembly Act, provided:

> On the day this Act comes into force, the members of the public service of Ontario who have agreed to accept employment in the Office of the Assembly shall cease to be employed in the public service and such person shall become an employee of the Office of the Assembly at a salary of not less than he was receiving on the day immediately before the day this Act comes into force.

Prior to the coming into force of this provision, the persons in question had been sent a letter, dated October 2, 1974, from Mr. J.C. Thatcher, Deputy Minister of the Ministry of Government Services. The text of this letter is set out below:

I am writing to confirm the main points covered by Mr. Strauss and Mr. Fleming during the discussions held with you and your colleagues yesterday, regarding the changes resulting from the accepted recommendations of the Commission on the Legislature as they affect you and your job.

Probably the most important point to note is that the forthcoming organizational changes which will remove your job from the Ministry of Government Services and from the Civil Service and which will establish the same function under the jurisdiction of the Speaker in a non-Civil Service capacity, are the result of a constitutional and largely symbolic decision. They will have no effect on your salary, benefits, or basic working conditions nor will your career opportunities be adversely affected. You will remain a Crown employee.

While the change will remove your position from the jurisdiction of the Management Board, the Civil Service Commission and from representation by the C.S.A.O., equivalent salary (i.e. with comparable positions in the Civil Service) and eligibility for all the employee benefit provisions, including your continued contributor status under The Public Service Superannuation Act will be maintained.

Mr. Speaker, the Honourable A.E. Reuter, has asked me to convey his hope that you will decide to accept the offer to join his staff in your present job when the new arrangements become effective later this year. The exact date depends on the approval of legislation which is scheduled for the Fall Session.

I want to encourage you to accept this offer, both in your own interest as well as for the con-

tinued effectiveness of the operation to which you now contribute. However, as Mr. Strauss pointed out, you are entitled to be made aware of the alternative which will be available to you. You could exercise your rights under Section 30 of the Regulation made under the Public Service Act pertaining to lay-off and recall, but we hope you will agree to join the Speaker's staff. Please let your supervisor know if nevertheless you do not want to do so.

If we do not hear from you, it will be assumed that you want to continue to perform your present duties with essentially the same conditions of employment under the Speaker's jurisdiction.

I want to take this opportunity to thank you for good work done as a member of the staff of the Ministry of Government Services and to wish you well for the future.

If you have any further questions, please contact your line supervisor or Mr. R. Shepherd, Assistant Director, Personnel Branch.

None of the persons in question indicated that they did not wish to continue under the new arrangements. It was not disputed that this lack of action constituted acceptance of the new employment arrangement. We find, therefore, that the eighteen persons did agree to accept employment in the Office of the Assembly. Subsequently, when section 91 of The Legislative Assembly Act came into force, the respondent employer, the Crown in Right of Ontario (Ministry of Government Services) ceased to recognize the applicant as bargaining agent for the eighteen persons, and discontinued the collection of dues from these persons.

The applicant contends that the actions of the respondent were improper, and requests either a declaration that the persons in question are and continue to be capable of being represented by the applicant, or that, on December 20, 1974, the respondent violated those terms of The Crown Employees Collective Bargaining Act, 1972, relating to union recognition and the collection of dues. The essence of the applicant's arguement is that, since the amendments did not deal with the collective bargaining status of the eighteen persons in clear and unequivocal terms, these persons are still entitled to collective bargaining rights under the Act.

The respondent, on the other hand, contends that the effect of the recent amendments to The Legislative Assembly Act is the creation of a new employment status for the eighteen persons, which is neither that of a member of the public service or that of Crown employee. This argument emphasized the constitutional distinction between the legislative and executive branches of government, each branch being independent of the other. Because of the historic independence of the two bodies, it was argued that the persons employed by the Office of Assembly could not be considered as Crown employees and, therefore, fell outside the ambit of the Act.

It is obvious that the answer to the question of whether a person is an "employee" is one that determines

the outer limits of the Act. The Act itself, however, does not provide a complete definition of this term, simply stating that "'employee' means a Crown employee as defined in The Public Service Act" (followed by certain exclusions not relevant to this case). The definition in The Public Service Act states that "'Crown employee' means a person employed in the service of the Crown or any agency of the Crown, but does not include an employee of The Hydro-Electric Power Commission of Ontario, or the Ontario Northland Transportation Commission". This definition leaves open the question of what is meant by employment in the service of the Crown. Does it refer to those working for any branch of the government, or to just those working for the executive branch of government?

Each of the parties, not surprisingly, provide a different answer to this question. In each case, however, the answer depended upon acceptance of a presumption. The applicant argued that the applicable presumption was that existing rights should not be divested in the absence of clear language to the contrary and, therefore, the eighteen persons continued to be Crown employees. The respondent, on the other hand, argued that a Crown employee could only be a person working for the executive branch of government, because of the presumption that the executive and legislative branches are to be separate and independent branches of government.

The application of either presumption is not without difficulty. If the applicant's presumption is accepted, we must necessarily determine that persons, although being employed by the Office of Assembly, are still employees of the executive branch. On the other hand, if the respondent's presumption is accepted, we must conclude that the eighteen persons, although obviously public employees who work under terms and conditions of employment virtually identical to those of Crown employees, are nevertheless not entitled to collective bargaining rights under the Act. In the final analysis, the Tribunal's choice of presumption must be dictated by a determination as to which of these results is more justified by the facts in the case, and not by blind adherence to either presumption.

The question, then, is whether on the facts it is reasonable to regard the legislature as a separate employer of these eighteen persons. If, in fact, the legislature is acting as a separate employer, exercising managerial control over these people, then it seems reasonable to conclude that these persons are not "Crown employees". If, on the other hand, the Office of Assembly is employer in name only, with the Executive branch still performing the function of employer, then it seems more reasonable to conclude that the persons are "Crown employees". Otherwise, vested collective bargaining rights could be divested by a mere change of form.

The search for the answer to this question leads us to consider the recently amended Legislative Assembly Act. We have already set out s.91 of that Act, which provides that persons employed in the Office of the Assembly shall cease to be employed in the public service. Although the wording of this provision strongly suggests that the legislature intended that it become a government employer distinct and apart from the executive, it also leaves open the possibility that it was intended that persons employed by the Office of Assembly would be divested of their status as public servants but would still remain employees of the executive branch. This latter inference, however, is dispelled by some of the other amending provisions. Section 72, dealing with the appointment of officers and staff, provides that employees of the Office of Assembly (with certain very limited exceptions) are to be appointed by the Speaker. Section 86 gives to the Speaker authority, subject to the approval of the Legislature's Board of Internal Economy, over such matters as job classification, salary ranges, vacation, sickleave, leave of absence and welfare benefits. The Board of Internal Economy, established under s.82 and given wide managerial powers by s.84, is not a creature of the executive but, rather, a body to which the appointments from the legislative branch are in the majority. Section 89 gives the Speaker power to reprimand, suspend and dismiss employees of the Office of Assembly, except for

certain limited exceptions not applicable to the eighteen persons in question.

These legislative provisions show a clear intention by the legislature to become a separate employer. All of the usual employer powers - the power to hire, fire, discipline and to set terms and conditions of appointment have been transferred to the Office of Assembly from the executive branch. It appears clear that it was intended that the legislature be a separate employer in fact, and not merely one in form. Since the legislature has in fact become a distinct and separate employer, we must conclude that the eighteen persons are not "Crown employees" and, therefore, not covered by the Act.

In arriving at this conclusion, we have considered the amendment to the Act occurring sometime after this application was made. Although we have doubts about our jurisdiction to consider this amendment, we need not resolve these doubts because, in our opinion, this amendment does not add weight to either argument. The amendment deleted the express exclusion of "a person employed in the office of the Speaker, Deputy Speaker or Clerk of the Assembly" from the ambit of the Act. It is possible to construe this deletion as evidencing an intention to include employees of the newly-vested Office of the Assembly under the Act, but it is equally possible to construe the deletion as amounting to legislative

acknowledgement of the fact that, because of the amendments to The Legislative Assembly Act, these employees were no longer "Crown employees", so that no express exclusion was necessary. As we have already stated, this matter can only be resolved by determining who in fact exercises the power of employer and not by the interpretation of statutes in the abstract. The fact that the express exclusion has been deleted, therefore, is of no assistance in resolving the question before us.

We conclude, for the reasons given above, that the application should be dismissed.

Dated this 1st day of March, 1976.

Judge Walter Little
Chairman

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL File #3/75

BETWEEN: MARY STAPLEY Applicant

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION Respondent Employee Organization

- and -

THE CROWN IN RIGHT OF ONTARIO Respondent Employer or Agency of the Employer

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal Members, Peter Riggin and Roslie Abella

APPEARANCES AT THE HEARING: The Applicant in person and A. Millard for the Respondent Employee Organization

DATE OF HEARING: December 10th, 1975

DECISION OF THE TRIBUNAL

By letter dated July 26, 1976 the applicant has requested the Tribunal to reconsider its decision dated July 8, 1976. The respondent union by letter dated September 13, 1976 objected to the matter being "re-opened unless the applicant provides some prima facie evidence that she was somehow prevented from providing information which was available at the time of the original hearing".

It is the view of the Tribunal that we should treat the applicant's letter as a request for reconsideration pursuant to Section 37 of The Crown Employees Collective Bargaining Act S.O. 1972, and amendments thereto.

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At the initial hearing in this matter the applicant was given a full opportunity to present her case. She testified as to her religious objections or beliefs and indicated to the Tribunal why she objected to paying dues or contributions to the employee organization.

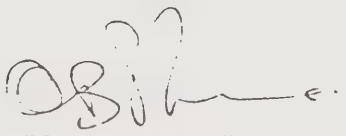
The Tribunal recognized that the applicant was a lay person and had presented her own case and the Tribunal was prepared to draw reasonable inferences from the evidence. After due consideration and notwithstanding that the Tribunal had concluded that the applicant was a religious person it determined that there was not a relationship or nexus between her religion and her objection to paying dues to the union.

In her request for reconsideration the applicant has not indicated that she did not have the opportunity to present all of the material evidence to the Tribunal at the original hearing nor has she indicated that there is other evidence or new evidence which was not available to her at the original hearing. She has reiterated her position that she is religious - a position that the Tribunal accepted and claims that the union policies are inconsistent with her beliefs and convictions. However her testimony dealing with her concerns was considered in the context of all of her testimony and it was after the total evidence of the applicant was considered that the application was dismissed.

In the circumstances, after considering all of these factors the Tribunal after due reconsideration is not prepared to vary or revoke

its original decision and the applicant's request is denied.

Dated at Toronto this 12th day of November 1976.



"O. B. Shime"
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL T/5175

Between: R.T. Campbell

Applicant

- and -

The Civil Service Association of Ontario (Inc.)

Respondent

- and -

The Crown in Right of Ontario

Respondent
Employer

BEFORE: O.B. Shime, Chairman, and Tribunal Members R.P. Riggin and R.S. Abella

DECISION OF THE TRIBUNAL:

The applicant was given notice of the hearing and did not appear. Accordingly this application is dismissed.

December 11, 1975

for the Tribunal

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ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL File #6/75

BETWEEN: KARI LENNART LUORANEN Applicant

- and -

THE CIVIL SERVICE ASSOCIATION OF ONTARIO (INC.) Respondent Employee Organization

- and -

THE CROWN IN RIGHT OF ONTARIO Respondent Employer or Agency of the Employer

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal Members, Peter Riggin and Rosalie Abella

APPEARANCES AT THE HEARING: The Applicant in person and A. Millard for the Respondent Employee Organization.

DATE OF HEARING: December 10th, 1975

DECISION OF THE TRIBUNAL

The name "The Civil Service Association of Ontario (Inc.)" appearing in the style of cause of this application is amended to "The Ontario Public Service Employees Union".

This is an application pursuant to Section 15 of the Crown Employees Collective Bargaining Act 1972 and amendments thereto. The applicant

is employed at the Sheridan College of Applied Arts and Technology. He is a member of the Seventh Day Adventist Reform Church and believes that the will of God has been revealed through the writings of Ellen G. White whom his church considers to be a prophet and divinely inspired.

Some of the writings of Ellen G. White contain references to labour unions. In particular, the applicant has referred the Tribunal to a statement of Ellen G. White which states that "those who claim to be the children of God are in no case to bind up with labour unions.....".

There is no question, that the applicant is religious and that he bases his objection to payment of union dues on the writings of Ellen G. White whom he believes has been directed by God in her writings.

The representative of the respondent submitted that the applicant's claim for exemption is based on the writings of an individual and cautions the Tribunal to be cautious of applications which may abuse the purpose of Section 15. The applicant submits that he is religious and that he bases his application on his religious convictions or belief.

After considering the evidence and the arguments, it is apparent that the applicant is a religious man who bases his objection on his religious belief. The applicant has, accordingly, satisfied

the requirements of Section 15 and the tests enunciated by this Tribunal in considering applications under Section 15. See L. van Harten v OPSEU et al (1976), unreported.

Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to OPSEU and that the amounts claimed thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

DATED AT TORONTO this 5th day of July 1976.

"O. B. Shime"

for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL FILE #9/75

BETWEEN: L. VAN HARTEN Applicant

- and -

THE CIVIL SERVICE ASSOCIATION OF ONTARIO (INC.) Respondent Employee Organization

- and -

THE CROWN IN RIGHT OF ONTARIO Respondent Employer or Representatives of the Employer

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal Members, Peter Riggin and Rosalie Abella

APPEARANCES AT THE HEARING: G. Vanderzande for the Applicant, and A. Millard for the Respondent Employee Organization.

DATE OF HEARING: October 21st, 1975

DECISION OF THE TRIBUNAL.

The name "The Civil Service Association of Ontario (Inc.)" appearing in the style of cause of this application is amended to "The Ontario Public Service Employees Union".

This is an application pursuant to Section 15 of the Crown Employees Collective Bargaining Act 1972, and amendments thereto wherein the applicant requests an exemption from the payment of dues to the respondent employee organization (herein after referred to as "OPSEU") on the basis of his religious convictions or belief. This panel of the Tribunal, similarly constituted, has had the opportunity of hearing a number of applications and arguments with respect to Section 15 and since this is the first case of this type to be dealt with by the current Tribunal, we have taken some time to consider the issues raised and argued with the realization that this may well set guidelines for future applications under this Section.

The applicant has been employed by the respondent employer since 1969 and became a member of OPSEU or its predecessor shortly after he commenced his employment. For the purpose of this decision, the predecessor to OPSEU will also be referred to as OPSEU. When he became a member of OPSEU, he acted on information given to him by a representative of OPSEU that it was necessary to become a member and he was unaware that it was not a condition of employment that he become a member. In 1974, the applicant took steps to resign his membership and subsequently he brought this application.

The applicant is a member of the Free Christian Reform Church which he joined shortly after he arrived in Canada in 1969. As well as being a member he also supports the church financially. He testified that the basic reason for claiming exemption from the payment of dues to OPSEU is because it is not founded on the Bible. Related to this basic objection are a number of other reasons for claiming exemption. The applicant objects to OPSEU's holding of meetings on Sundays which he testified confirms his views that OPSEU is not founded on the Bible. He also objected to OPSEU attempting to seek the right to strike which he claims is contrary to the oath which he took when he became a government employee and that OPSEU's militant position is "against the scripture".

The applicant founds his claim for exemption on Section 15 of the Crown Employees Collective Bargaining Act 1972 and amendments thereto which provides as follows:

(1) The parties to a collective agreement may provide for the payment by the employees of dues or contributions to the employee organization.

(2) Where the Tribunal is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Tribunal shall order that the provisions of the collective agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered as such under Part I of the Income Tax Act (Canada) as may be designated by the Tribunal.

(3) No collective agreement shall contain a provision which would require, as a condition of employment, membership in the employee organization. 1972,c.67, s.15.

In determining the principles to be applied in applications under this Section it is of interest to note the decisions of the Ontario Labour Relations Board which is empowered to deal with a similarly worded (although not precisely the same) Section of the Labour Relations Act. Since the two statutes are so similar in language and content with respect to applications concerning religious objectors, we must assume that since they were enacted by the same legislature that they were intended to have a similar application. We pause to note that we are not bound by the decisions of the Ontario Labour Relations Board

and where we are not in agreement with its views, we do not propose to follow its decisions. However, we consider certain observations that that Board has made concerning the religious objection cases to be apposite.

In Anthony J. Vis. The Hamilton Beverage Dispensers Union, Local 197 v Sheraton Limited - Sheraton Connaught Hotel (1972) OLRB Rep 249 the competing interests inherent in this type of enactment are reviewed. The Board stated at p. 250:

> *In our society the assertion of one freedom may often conflict with the assertion of other freedoms. For example, because a trade union must by operation of law be the bargaining agent for and represent all employees in a particular bargaining unit individual employees lose their freedom to contract on an individual basis with their employer. Inherent in Section 39 of the Act is the recognition that the freedom to associate into trade unions for collective bargaining and the protection afforded to that freedom has come into conflict with freedom of religion.*
>
> *Trade unions which are required to represent all employees in a bargaining unit in a fair and honest manner have sought support for their activities from all employees in the bargaining unit either by way of membership or dues payment. There are, of course, many persons who object to being members of certain trade unions or who object to paying dues or other assessments for individual and personal reasons. Notwithstanding these individual objections trade unions have been permitted to compel membership or dues on the basis that they are required by law to represent all the employees in the bargaining unit. This Board has long held the view that because individuals are required to surrender their individual bargaining and trade unions are required to take up those rights and represent all the employees that trade unions must open their membership to all those employees.*

In our view, it is part of the necessary democratic process that employees have a say and be permitted to participate in the agency that is compelled by law to conduct their employment affairs.

Trade unions are also of the view that because they are obligated to represent all the employees in a fair and honest way and that in so doing they incur considerable expense that there is a responsibility on all who share in the benefit of this representation to contribute. Thus, trade unions that provide economic research, legal advice and expert advisors to employees feel that at the very least the employees who receive the benefit of such representation shall contribute to the expense of providing such benefits. "Free riders" are considered an anathema by the trade union movement and by their dues contributing employees; the trade union consider that the failure by employees to contribute what they consider to be their fair share of the expenses weakens the trade union movement and saps the strength of the concept of free association inherent in the legislation.

Whatever the merit of that particular issue the legislature of this province has decided that on balance the interests of freedom of religion deserve consideration to the point of exemption from trade unions and has enacted section 39 to provide that persons with religious objections by order of this Board may not be required to become members of a trade union or to pay dues to the trade union. The legislature has not permitted these persons to become free riders, in the sense, that persons exempted are required to pay an amount equivalent to union dues to a charitable organization.

The merits of the issue have thus been decided by the legislature. On balance it has opted for freedome of religion and it only remains for this Board to determine whether individuals comply with the legislation. This Board, and quite properly so, because the balance of freedoms in our democratic society is a matter for the legislature, is not given the authority under the statute to weigh the merits of the debate between freedom of association and freedom of religion.

Our function is simply to determine whether an individual applicant comes within the meaning and intention of the statutory exemption.

This Tribunal is in agreement with the assessment of the competing interests as articulated by the Ontario Labour Relations Board and we are also of the view that our function is similar to the function exercised by that Board in considering applications for religious exemption. We now turn to some of the other matters that have been raised by way of argument.

The representative for OPSEU in this case and others has asked this Tribunal to define the term "religious convictions or belief". The task of determining whether a person has a religious conviction or belief can be most difficult. This Tribunal must be cautious not to put an applicant to the condition of satisfying our individual views as to what each of us may consider to be religious. Also we are not prepared to disqualify certain convictions or belief as being religious in character based upon a priori basis.

Further, we do not believe that we can define the term "religious" in a manner that will be relevant to all future applications under this Section. There are many cases that do not require an extensive definition to arrive at a decision, although there may be some cases where an applicant's convictions or belief must be tested against some objective definition. However, we determine that the term "religious" need not be construed in the sense that it must be a tenet of a particular religious faith or religious institution. An applicant's religious convictions or belief, must, in the main, be considered from a subjective point of view. While we consider

religion as being subjective and personal to the individual, we recognize that there are peripheral situations where an applicant may attempt to use the concept of religion to escape from the payment of dues to OPSEU. Thus we think it relevant to examine the sincerity of an applicant's religious convictions or belief in order to preclude an abuse of the Section. Re Anderson v The Civil Service Association of Ontario (Inc.) and The Crown in Right of Ontario (1975) 9 O.R. (2d) 341 (Div.Ct.); Funk v Manitoba Labour Board, 76 C.L.L.C. 14235 (C.A.); Stel v The North York Civil Employees Union, Local 94, CUPE v The Corporation of the Borough of North York (1971) O.L.R.B. Rep 363 at 375.

This Tribunal is also of the opinion that once it is determined that an applicant is religious that the applicant must also establish that the objection to paying dues or contributions to an employee organization stems from the applicant's religious convictions or belief. There must be some nexus between the religious convictions or belief and the objection. We do not have jurisdiction to grant an exemption to those whose social principles form the basis for the objection. Social principles do not involve religious convictions or belief as those terms are generally understood. See Trenton Construction Workers Association Local 52 v Tange Company Limited 63 C.L.L.C. par.15459 at p.622 per McCruer C.J.H.C.

Further, we do not have the authority to grant an exemption to persons who are religious and who have social or political views unconnected to their religion which are contrary to those of the employee organization. There must be relationship between the religious con-

victions or belief and the objection to the payment of dues.

Further, the Tribunal realizes that an applicant may arrive at his objection in a variety of ways. We are not prepared to question the logic as to how an applicant arrives at his particular religious convictions or belief, nor are we concerned with the logical analysis of a particular applicant in relating the objection to payment of union dues to a religious conviction or belief - our concern is whether the applicant holds such religious convictions or belief and whether he personally relates such convictions or belief to his objection.

Applying those considerations to the facts of the instant case, it is our opinion that the applicant is a religious man and bases his life, as best as possible, on his interpretation of the Bible. He is a member of a particular church and it is without doubt that he holds religious convictions and beliefs, that he is sincere in those beliefs and that his objection to paying his dues is related to his religious convictions. Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to OPSEU and that the amounts equivalent thereto are to be remitted by the respondent. employer to a charitable organization mutually agreed upon by the applicant and OPSEU. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to

agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

DATED AT TORONTO this 5th day of July 1976.

"O. B. Shime"

for the Tribunal

T10/75

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between: J. Theo Abraham

Applicant

- and -

The Civil Service Association of Ontario (Inc.)

Respondent

- and -

The Crown in Right of Ontario

Respondent
Employer

BEFORE: O.B. Shime, Chairman, and Tribunal Members R.P. Riggin and R.S. Abella

DECISION OF THE TRIBUNAL:

The applicant was given notice of the hearing and did not appear. Accordingly this application is dismissed.

December 11, 1975

for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL FILE #12/75

Between: JOHN RAYNOR Applicant,

-and-

ONTARIO PUBLIC SERVICE EMPLOYEES UNION Respondent Employee Organization

-and

THE CROWN IN RIGHT OF ONTARIO Respondent Employee Organization

Before: Owen B. Shime, Q.C., Chairman and Tribunal Members, Peter Riggin and Rosalie Abella.

Appearances at the Hearing: The Applicant in person and A. Millard for the Employee Organization.

Date of Hearing: October 27th, 1975.

DECISION OF THE TRIBUNAL

In a prior decision in this matter this Tribunal had ordered that the applicant because of his religious convictions or beliefs was not required to pay dues or contributions to OPSEU and that the amounts equivalent thereto were to be remitted to a charitable organization mutually agreed upon by the applicant and OPSEU. In accordance with Section 15(2) of The Crown Employees Collective Bargaining Act the Tribunal retained jurisdiction to designate the appropriate charitable organization if the parties failed to reach agreement.

The Tribunal has now been advised that the parties have been unable to reach an agreement.

After due consideration it is our view that we should designate a charitable organization located in the area where the applicant either resides or works. Accordingly we designate THE BARRIE AND DISTRICT UNITED APPEAL (#0008300-05-13) to be the recipient charitable organization of the amounts equivalent to dues in accordance with our decision dated July 8th 1976.

Dated at TORONTO ONTARIO this 29th day of November, 1976.

"O. B. Shime"
for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL File #14/75

BETWEEN: S. GEIST Applicant

- and -

THE CIVIL SERVICE ASSOCIATION OF ONTARIO (INC.) Respondent Employee Organization

- and -

THE CROWN IN RIGHT OF ONTARIO Respondent Employer or Representative of the Employer

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal Members, Peter Riggin and Rosalie Abella

APPEARANCES AT THE HEARING: The Applicant in person and A. Millard for the Respondent Employee Organization.

DATE OF HEARING: February 16th, 1976

DECISION OF THE TRIBUNAL

The name "The Civil Service Association of Ontario (Inc.)" appearing in the style of cause of this application is amended to "The Ontario Public Service Employees Union".

This is an application pursuant to Section 15 of the Crown Employees Collective Bargaining Act 1972 and amendments thereto. The applicant has been employed by the government since March 10, 1975. He is a member of the Seventh-Day Adventists Church and attends regularly. He also pays a tithe to the church as well as other church expenses.

He has been opposed to unions all of his life and in the past when looking for a job he declined employment where it was necessary to be a member of a union.

There is no doubt that his opposition to unions is based on his religious convictions. He claims that unions are not based on the Bible and that the Bible, as he interprets it, prohibits persons from joining secular organizations. He also testified that the Bible commands him not to strike, nor in a forceful way to obtain goods and that he should be gentle to all men and content with his wages. The applicant also objects to taking the union oath which he feels is inconsistent with his oath to his employer and he refuses to bind his conscience to a majority vote in any organization. Because of his beliefs he is prepared to leave his job if he is required to pay union dues.

The union did not call any evidence.

The representative for the union admitted, and correctly so, that the applicant was religious and asked the Tribunal to carefully scrutinize the evidence.

Having regard to the evidence and the arguments, the Tribunal determines that this is a clear case of a religious employee who objects to payment of union dues because of his religious convictions within the meaning of Section 15.

Accordingly, we order that the provisions of the collective agreement

pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to OPSEU and that the amounts claimed thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

DATED AT TORONTO this 5th day of July 1976.

"O. B. Shime"

for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL File #15/75

BETWEEN: SISTER ELIZABETH SEXTON, C.S.J. Applicant

- and -

THE CIVIL SERVICE ASSOCIATION OF ONTARIO (INC.) Respondent Employee Organization

- and -

THE CROWN IN RIGHT OF ONTARIO Respondent Employer or Representative of the Employer

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal Members, Peter Riggin and Rosalie Abella

APPEARANCES AT THE HEARING: The Applicant in person and A. Millard for the Respondent Employee Organization

DATE OF HEARING: October 21st, 1975

DECISION OF O.B.SHIME, CHAIRMAN AND BOARD MEMBER PETER RIGGIN

The name "The Civil Service Association of Ontario (Inc.)" appearing in the style of cause of this application is amended to "The Ontario Public Service Employees Union".

This is an application pursuant to Section 15 of the Crown Employees Collective Bargaining Act 1972 and amendments thereto. The applicant, as may be seen from the style of cause is a member of a religious order - The Congregation of The Sisters of St. Joseph and has been employed by the Ministry of Community and Social Services since April 1973. In her application she stated "I cannot morally support the policies of the union as a Christian and as a Sister of St. Joseph

I believe I cannot support the union because of what my vow of poverty means to me".

In her testimony the applicant stated that she had to make a decision what to do if a strike was called and that it became a matter of conscience that she couldn't strike. Because a strike was being advocated she made this application. She also stated that she had no quarrel with unions "to the point where it affected her conscience" and therefore she was unable to support an organization that advocated a strike because her job was related to other people and she was unable to suspend her services. She feels that service is part of a higher obligation.

The union elected to call no evidence.

The representative for the union submitted that the applicant did not demonstrate that her religious convictions or belief formed the basis for her objection and that her objection was merely a disagreement with the union's policy and that the Tribunal should reject the application. The applicant on her own behalf admitted that her objection was based on her conscience but she claimed that her conscience stemmed from her religious convictions and belief. As she stated "if it doesn't come from there I don't know where it comes from".

Again there is no doubt that the applicant is religious. The issue in this case is whether her objection is related to her religious convictions or belief within the meaning of Section 15. The applicant chose to represent herself - she is not a skilled advocate and in these circumstances it is appropriate to draw reasonable inferences

from the evidence. It is apparent that the applicant views religion as guiding the whole of her life including her work. She has taken a vow of poverty and views her work as a service. Religion embraces the whole of her existence. Thus when she testified that paying union dues became a matter of conscience she was not founding her objection on a social or philosophical basis as distinct from a religious basis - rather, to her, "conscience" is a matter that is bound up with her religious convictions or belief which forms the basis for her total way of life. In these circumstances we are satisfied that the applicant's objection to payment of dues is related to her religious conviction or belief within the meaning of Section 15.

Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and she is not required to pay dues or contributions to OPSEU and that the amounts claimed thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

DATED AT TORONTO this 8th day of July 1976.

"O. B. Shime"
for the majority

DISSENT OF R. S. ABELLA

For the reasons set out in the Stapley decision (unreported) I dissent from the above decision of the Tribunal.

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL File #18/75

BETWEEN: J. B. KRUISSELBRINK APPLICANT

- and -

THE CIVIL SERVICE ASSOCIATION OF ONTARIO (INC.) RESPONDENT EMPLOYEE ORGANIZATION

- and -

THE CROWN IN RIGHT OF ONTARIO RESPONDENT EMPLOYER OR AGENCY OF THE EMPLOYER

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal Members, Peter Riggin and Rosalie Abella

APPEARANCES AT THE HEARING: The Applicant in person and A. Millard for the Respondent Employee Organization.

DATE OF HEARING: December 10th, 1975

DECISION OF THE TRIBUNAL.

The name "The Civil Service Association of Ontario (Inc.)" appearing in the style of cause of this application is amended to "The Ontario Public Service Employees Union".

This is an application pursuant to Section 15 of the Crown Employees Collective Bargaining Act 1972 and amendments thereto. The applicant has been employed by the government since 1967 and was a member of the predecessor to the respondent union since that date. He is also a member of the Guelph Reform Church. He stated that "all rules are

set over us by God and are supposed to be obeyed". He testified that he objected to the union's tactics which advocated an illegal strike. The applicant has no objections to strikes, but he disagreed with the union because he was advised that a strike is against the law.

The union did not call any evidence.

The representative of the union claims that the applicant had based his claim on a secular objection and further that he was not aware of the facts, but that in any event an illegal strike did not occur. The applicant, in response, submitted that all rules should be obeyed because they are given to us by God and accordingly the issue of a strike should not exist.

Having regard to the evidence and to the argument, we are of the opinion that the applicant has satisfied the initial requirement of Section 15 and demonstrated that he has religious convictions or belief. The issue to be determined in the application is whether there is a relationship between his religious convictions or belief and his objection to payment of union dues.

Interwoven into that issue is the position that this Tribunal ought to adopt when laymen who are unrepresented appear on their own behalf at hearings before the Tribunal. It is apparent that the parties who appear before us are not only represented by lawyers, but also by laymen. Many laymen who do appear to represent various parties are very experienced and, accordingly, the standard to be expected from that type of person is quite high. However, in this case the applicant

who is representing himself is inexperienced, not only as an advocate, but appears to be inexperienced in matters of this sort. Accordingly, it is the Tribunal's view that while it is not our obligation to either make a case for an unskilled party representing himself or to fill in the gaps in an unskilled party's case, it is necessary and proper to draw reasonable inferences from the evidence.

In this matter, as indicated, we have no doubt that the applicant is religious. We are also of the view that it is his conviction or belief that all rules emanate from God. We take it to mean that the term "rules" used by the applicant includes laws or legislation. We are also of the opinion as in Raynor v OPSEU et al, (1976), unreported, that while we are not prepared to make any definitive finding on the union's position with respect to a strike, it is our opinion, that absent any evidence from the union, the applicant perceived the union as adopting such a position. Accordingly, since such a position would be unlawful or contrary to God's "rules" as perceived by the applicant, we think it reasonable to infer that he objected to payment of his union dues because he felt that the union was acting contrary to God's will. Since he had been a member of the union for some time and after considering the totality of his evidence we have no reason to conclude that the applicant seeks to improperly avoid his obligation to the union; he appeared sincere in his religious belief and sincere in his perception of the union's stance. In all the circumstances, we are prepared to infer that his objection was related to his religious convictions or belief.

Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to OPSEU and that the amounts claimed thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

DATED AT TORONTO this 8th day of July 1976.

"O. B. Shime"

for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL File #19/75

BETWEEN: JUNE L. JAMER Applicant

- and -

THE CIVIL SERVICE ASSOCIATION OF ONTARIO (INC.) Respondent Employee Organization

- and -

THE CROWN IN RIGHT OF ONTARIO Respondent Employer or Representative of the Employer

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal Members, Peter Riggin and Rosalie Abella

APPEARANCES AT THE HEARING: Gerald Vandezande for the Applicant and A. Millard for the Respondent and Employee Organization

DATE OF HEARING: February 16th, 1976

DECISION OF THE TRIBUNAL

The name "The Civil Service Association of Ontario (Inc.)" appearing in the style of cause of this application is amended to "The Ontario Public Service Employees Union".

This is an application pursuant to Section 15 of the Crown Employees

Collective Bargaining Act 1972 and amendments thereto. The applicant is employed by the Ministry of the Attorney General and has been an employee of the government since September 6, 1966. She had originally been a member of the predecessor to the OPSEU. However, she is a religious person whose views have been evolving through reading and studying the Bible. She is a member of the Seventh-Day Adventists Church and contributes financial support to her church.

She has found that the union is aggressive which is contrary to her understanding of the Bible which demands that she "live peacefully with all men". She also testified that the Lord had told her "not to be bound up with a confederacy and to be free to make any decisions according to my conscience" and that this was in conflict with what she considers to be her obligation to follow the union regardless of whether she agrees with its aims. She also objects to the form of the union's oath which she claims is contrary to the oath taken to the employer.

She also testified that since joining the Seventh-Day Adventists she has realized that the union does not follow the guidelines that are in the Bible and testified that her objections to paying union dues were based on her religious beliefs and that God has directed her "not to be bound up with a union" and that unions create envy and strife which is against God's word.

The applicant also admitted to filing a prior application which she withdrew because she wished to be more certain in her application

and to provide a more cogent basis for her application and to be certain of her facts. She also claims that she "searched the word of God" to a greater extent so that her beliefs are now more certain.

The representative of the respondent, however, urges that her objection is based on supposition as to the role of the union and that she has not been consistent as evidenced by her filing two applications.

The representative for the applicant argued that the applicant's views have deepened and that there was no ulterior motive for withdrawing the first application. He also submits that she has a religious conviction or belief and that her views are related to that belief and that we should evaluate her situation on a subjective basis.

In our view the applicant is a religious person whose objection is based on her particular religious views. We accept also her explanation for withdrawing her first application. It was obviously withdrawn because of a sincere concern on her part that she required more factual evidence of the union's position to support her application; there was no improper motive for withdrawing that application.

Also while some of her views of the union are subjective nonetheless it is our opinion that those views are honestly and sincerely held and that her objections to the union are based upon the reasons given by this Tribunal in L. van Harten v OPSEU et al, we are of the opinion,

that the applicant has satisfied the requirements of Section 15.

Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and she is not required to pay dues or contributions to OPSEU and that the amounts claimed thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

DATED AT TORONTO this 5th day of July 1976.

"O. B. Shime"

for the Tribunal

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL File #22/75

BETWEEN: Victor R. Koop — Applicant

- and -

THE CIVIL SERVICE ASSOCIATION OF ONTARIO (INC.) — Respondent Employee Organization

- and -

THE CROWN IN RIGHT OF ONTARIO — Respondent Employer or Representative of the Employer

BEFORE: Owen B. Shime, Q.C., Chairman and Tribunal Members, Peter Riggin and Rosalie Abella

APPEARANCES AT THE HEARING: The Applicant in person and A. Millard for the Respondent Employee Organization.

DATE OF HEARING: December 11th, 1975

DECISION OF O.B. SHIME, CHAIRMAN AND BOARD MEMBER PETER RIGGIN

The name "The Civil Service Association of Ontario (Inc.)" appearing in the style of cause of this application is amended to "The Ontario Public Service Employees Union".

This is an application pursuant to Section 15 of the Crown Employees Collective Bargaining Act 1972 and amendments thereto. The applicant is employed by the Government in the Department of Psychology at the London Psychiatric Hospital. In his view the union operates in a manner that is contrary to his beliefs and which he finds to be intolerable. He claims that the union responds in selfish ways and not to a higher order

of morality. In particular, he does not endorse what he perceives to be a more militant position on behalf of the union and he referred to the respondent union's "Free the Servants" campaign. While he is not prepared to endorse everything that the Government does, he is of the view that there comes a time when one has a duty to act in a moral way. He claims that his position comes from his affiliation with the Mennonites and is influenced by that background.

The representative for the respondent union submitted that the applicant's position is based on a personal belief and that it is not related to a supreme being or on any particular recognizable religious grounds. He urged that this was a moral position and that the Tribunal's role was not to judge moral positions but to determine whether an applicant objects to payment of dues because of "religious convictions or belief".

In response, the applicant argued that morality and faith are not separate and that his own moral position is "an outgrowth of and inseparable from his faith position".

It is readily apparent from the evidence that the applicant is religious and that his personal positions are inextricably interwoven into his religious background and belief. There is no question that the applicant's objection to payment of union dues flows from and is related to his religious convictions.

Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent

employee organization do not apply to the applicant and he is not required to pay dues or contributions to OPSEU and that the amounts claimed thereto are to be remitted by the respondent employer to a charitable organization mutually agreed upon by the applicant and OPSEU. In the event that they are unable to agree on the charitable organization the Tribunal retains jurisdiction to designate the charitable organization. If the parties are unable to agree then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

DATED AT TORONTO this 8th day of July 1976.

"O. B. Shime"
for the majority

DISSENT OF R. S. ABELLA

For the reasons set out in the Stapley decision (unreported) I dissent from the above decision of the Tribunal.